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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

No. 71-1433

THOMAS BELLISTON, REED W. ASHCRAFT, WILLIAM M. BARR, BLAIR N. BARTON, JOE A. DANIELS, WIN FAILNER, LAWRENCE B. FORBUSH, DARRELL E. HERZOG, CLARENCE HOLLINGSHEAD, MAX JARDINE, BILL LEWIS, RAY SHIELDS, MARVIN E. THORNTON, WILLARD P. McEWAN, and ALFRED C. NIELSEN,
Petitioners,

vs.

TEXACO, INC., *Respondent.*

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit

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Petitioners,

vs.

TEXACO, INC., *Respondent.*

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Tenth Circuit

I. PETITION

Petitioners Thomas E. Belliston et al. pray that a writ of certiorari issue to review the judgment in this case of the United States Court of Appeals for the Tenth Circuit,

entered in this case on February 4, 1972, the order of that Court on March 7, 1972 denying a rehearing, and the order of March 28, 1972 awarding respondent costs on appeal in the amount of $34,920.25.

II. OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is appended hereto as Appendix A, and the order denying rehearing is appended as Appendix B. The order granting respondent costs on appeal of $34,920.25 is appended as Appendix C. There were no reported opinions in the District Court.

III. JURISDICTION

Petitioners brought this private antitrust action for treble damages under 15 U.S.C. 1 and 2 and 13a. The jurisdiction of the District Court was based on 15 U.S.C. 15 and 28 U.S.C. 1337. Judgment of the District Court on the verdict of a jury in favor of petitioners was entered on October 29, 1970. Respondent filed a timely notice of appeal and jurisdiction of the Court of Appeals was based on 28 U.S.C. 1291. The Court of Appeals reversed and entered judgment for respondent on all counts on February 4, 1972. A timely petition for a panel rehearing or rehearing en banc was filed by petitioners in the Court of Appeals on February 18, 1972 and the same was summarily denied by that Court on March 7, 1972. Jurisdiction of this Court to review the judgment of the Court of Appeals on writ of certiorari is based on 28 U.S.C. 1254(1).

IV. QUESTIONS PRESENTED

The horizontal price fixing claim:

1. Whether the meeting competition defense of Section 2b of the Robinson Patman Act and this Court's interpretation thereof in *F.T.C. v. Sun Oil,* 371 U.S. 505 (1963) and *F.T.C. v. Staley,* 324 U.S. 746 (1945) authorize respondent integrated oil company and its major competitors routinely to exchange price information and constitutes a defense to a Sherman Act price fixing charge?

2. Whether the Court of Appeals erroneously distinguished *U.S. v. Container Corporation,* 393 U.S. 333 (1969) in holding that systematic exchange of prices among major oil companies only, for upward as well as downward price moves, selling a fungible product, gasoline, and controlling 85% of the market, where the effect of the price exchange was to cause the parties thereto exactly to meet one another's prices and to restrain lower prices, did not without more, conclusively establish a violation of the Sherman Act (15 U.S.C. 1 and 2)?

3. Whether the Court of Appeals misinterpreted the Sherman Act and applicable precedents of this Court in holding, by summarily denying rehearing and motion for new trial, that the following facts taken together and viewed in the light most favorable to plaintiffs did not present sufficient evidence for a jury to find that respondent had entered into an agreement with other major oil companies to fix and stabilize the price of gazoline:

a. Price identity;

b. Systematic exchange of prices among competitors controlling 85% of the market;

c. Undisputed evidence that competitors' prices learned directly from those competitors determined respondent's prices, for both upward and downward price moves;

d. Receipt by Texaco from American Oil Company of American's price zone map for the metropolitan area in suit, and conscious adherence by Texaco to the price zones thus established;

e. A verdict and judgment that Texaco had unlawfully controlled its dealers' resale prices;

f. Uniform exclusive dealerships among competitors;

g. Uniform price allowance programs among competitors?

4. Whether on petitioners' horizontal price fixing claim, the evidence of impact and damages was sufficient to support the verdict, within the framework of *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946) and *Zenith v. Hazeltine*, 401 U.S. 321 (1971), and whether the Court of Appeals usurped the function of the jury in finding that the price exchange did not affect the level of prices, where the jury had determined this damage issue otherwise?

The Robinson-Patman Act claim:

5. Whether the Court of Appeals erroneously distinguished *Standard Oil v. F.T.C.*, 340 U.S. 231 (1951) and misinterpreted Section 2a of the Robinson-Patman Act in holding that discriminatory sales of gasoline by Texaco

to commercial resellers within Salt Lake City, Utah were not in commerce and that therefore the Federal Courts lacked jurisdiction to hear petitioners' claim, where such gasoline was refined from crude oil produced outside of Utah and shipped in the flow of commerce pursuant to market demand in Utah, and where the prices at which gasoline was sold in Salt Lake City were determined by a national marketing program, and Texaco abundantly utilized the instrumentality of interstate commerce in selling gasoline in Salt Lake City?

6. Whether the holding of the Court of Appeals upon the Robinson-Patman commerce issue: that where gasoline is refined within a state and thence sold within that same state, the sales are not in commerce, regardless of other facts, including the interstate shipment of crude oil; creates for each major oil company an exemption from Robinson-Patman secondary and third line actions a) in each state in which such company has a refinery and b) in each state in which such company is supplied, as here, by a competitor having a refinery within the state, and thereby effectively repeals the Act as it may apply in the petroleum industry and prevents enforcement thereof by both private parties and the Federal Trade Commission?

7. Whether evidence of a so-called "functional discount" may constitute a defense to an anticompetitive price discrimination which is not justified by either statutory defense, cost justification or meeting competition?

8. Whether defendant-seller has made out a case for the jury upon its meeting competition defense where its discriminatory lower price is the product of its own and the industry's pricing system, and was not the result of

bargaining or any competitive circumstance peculiar to the favored customer?

*9. Whether the measure of damages in a secondary line Robinson-Patman action may be the amount of the discrimination as opposed to the value of diverted trade?

The tie-in claim:

10. Whether the Court of Appeals misinterpreted *F.T.C. v. Texaco, Inc.*, 393 U.S. 223 (1968) and Section 1 of the Sherman Act in holding that Texaco's same commission override program for tires, batteries and accessories ("TBA"), held a violation of Section 5 of the Federal Trade Commission Act in that case, and proof that Texaco enjoyed a dominant position with respect to the tying product, its dealer leases and supply agreements, and that a not insubstantial amount of commerce was involved in the tied product, did not, viewed in the light most favorable to plaintiffs, present an issue for the jury as to whether such program also constituted a violation of Section 1 of the Sherman Act?

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*These issues were raised by respondent, there appellant, in the Court of Appeals but are not discussed in the Court's opinion. As appears, some of them are purely matters of law. It is respectfully submitted that those which are not purely matters of law reflect certain of respondent's objections below which are unmeritorious. This Court has jurisdiction to determine these issues and they should be determined to permit affirmance in this Court of the judgment of the District Court. *Story Parchment Co. v. Patterson Parchment Paper Co.*, 228 U.S. 555 at pp. 567 and 568 (1931); *Keifer-Stewart v. Joseph E. Seagram and Sons, et al.*, 340 U.S. 211 at p. 214 (1951); *Perkins v. Standard Oil Company*, 395 U.S. 642 at p. 650 (1969). Cf. Those cases in which the complainant with a full factual record has been vindicated in this Court only to lose its case on remand. *FTC v. Bordon Co.*, 383 U.S. 637 (1966), 381 F.2d 175 (Fifth Cir. 1967); *FTC v. Anheuser Busch*, 363 U.S. 536 (1960), 289 F.2d 835 (Seventh Cir. 1961); *Utah Pie v. Continental Baking*, 386 U.S. 685 (1967), 396 F.2d 161 (Tenth Cir. 1968); cert. denied 393 U.S. 860 (1968).

*11. Whether on petitioners' TBA tie-in claim the evidence of impact and damages was sufficient?

Other issues:

*12. Whether respondent received a fair trial?

*13. Whether 15% of the trebled judgment is a reasonable attorneys' fee within the meaning of Section 4 of the Clayton Act (15 U.S.C. 15)?

14. Whether the Court of Appeals erred in overruling petitioners' objection and awarding respondent the cost of printing the entire trial transcript, approximately $30,000.00, where the applicable rules (Federal Rules of Civil Procedure 1; 28 U.S.C. 1924; Federal Rules of Appellate Procedure 30, 32) do not require and indeed discourage such printing, the Court did not order it, and the parties did not stipulate that it may be deemed a taxable cost, and where such costs present an effective deterrent to bringing treble damage actions?

*15. Whether the damage awards under the Sherman Act and the Robinson-Patman Act constitute double recovery for the same injury?

V. STATUTORY PROVISIONS INVOLVED

The statutes involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, Section 2a of the Clayton Act, commonly known as the Robinson-Patman Act, 15 U.S.C. 13a, and Section 4 of the Clayton Act, 15 U.S.C. 15. Upon the question presented relating to the propriety of a motion for new trial in the Court of Appeals on petition for rehearing, the pertinent provision is Federal

Rules of Civil Procedure 50(d), 28 U.S.C.A. Upon the question presented relating to costs, the pertinent rules and statutes are 28 U.S.C. 1924, Federal Rules of Civil Procedure 1, 28 U.S.C.A., and Federal Rules of Appellate Procedure 30a, 30b, and 32a, 28 U.S.C.A.

All of the foregoing statutes and rules are reprinted in pertinent part in the order here listed in Appendix D attached hereto.

VI. STATEMENT OF THE CASE

A. The nature of the case and its disposition in the Courts below.

Petitioners are fifteen Texaco branded dealers in Salt Lake City and respondent is Texaco, Inc., a major integrated oil company. Petitioners are independent businessmen who lease service station premises from Texaco and purchase gasoline from Texaco and resell it to the motoring public.

Petitioners presented four damage claims in the District Court. The first is that Texaco has combined and conspired with other major integrated oil companies operating in Salt Lake City to fix and stabilize the price at which gasoline is sold to dealers including petitioners, in violation of Sections 1 and 2 of the Sherman Act, causing injury to petitioners in the amount of the difference between the price they paid for gasoline in the four year damage period and what would have been the price in the absence of the violations (the horizontal price fixing claim). The disposition of this claim in the Courts below is as follows. Relying upon *Container Corp. v. U.S.*, 393 U.S. 333 (1969) the District Court instructed the jury

that an unlawful price fixing agreement had been conclusively established and submitted to the jury the issues of impact, that is, whether the price of gasoline would have been lower in the absence of the violation, and damages, or the amount by which they would have been lower. The affirmative defense of passing on has not been raised at any point in this case. The jury found that prices would have been approximately 2¢ per gallon lower in the absence of the violation and awarded total actual damages to the 15 petitioners in the amount of $274,733 which amount was then trebled by the Court.

The Court of Appeals reversed, holding that *Container v. U.S.*, supra, was "not controlling" and entered judgment for respondent. On petition for rehearing in the Court of Appeals, petitioners contended under Federal Rules of Civil Procedure 50(d) and applicable precedents of this Court[1], that they were entitled to a new trial on the horizontal price fixing claim, whether on a *Container* theory or on the broader general price fixing conspiracy theory viewing all the evidence in the light most favorable to petitioners. The petition for rehearing was summarily denied. Appendix B.

The second claim asserted by petitioners below is that respondent has combined to fix petitioners' resale price of gasoline in violation of Section 1 of the Sherman Act (the vertical price fixing claim). The jury found that respondent had combined to fix petitioners' resale prices, but found no damages. Neither party appealed from this judgment.

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[1] *Neely v. Eby Construction Co.*, 386 U.S. 317 (1962); *Weade v. Dichmann Wright and Pugh, Inc.*, 337 U.S. 801 (1948).

The third claim asserted by petitioners is that respondent has tied the purchase of certain brands of tires, batteries, and accessories to its dealer lease and supply contracts in violation of Section 1 of the Sherman Act, with the result that petitioners have been required to pay more for those products than they would have paid in the exercise of a free competitive choice of brands (the tie-in claim). The Court of Appeals characterized the disposition of this claim in the trial Court as upon directed verdict as a matter of law. ("Dealers contend that *Federal Trade Commission v. Texaco, Inc.*, 393 U.S. 223 (1968) condemned this same type of T.B.A. arrangement (tires, batteries, and accessories) and that Texaco violated the Sherman Act as a matter of law. We disagree." (Appendix A, p. xvii). However, the tie-in claim was submitted to the jury upon non-binding instructions based upon other pertinent precedents[2] of this Court, as well as *F.T.C. v. Texaco,* supra. Without reference to that case, the jury was instructed that if it found that Texaco enjoyed a dominant position with respect to the tying product (the dealer lease and supply agreements) and that a not insubstantial amount of commerce in the tied product was affected (tires, batteries and accessories) and also that respondent's TBA program in its details was inherently coercive of dealers when viewed in the context of respondent's dominant economic position with respect to

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[2]*Northern Railway v. United States,* 356 U.S. 1 (1958); *Fortner Enterprises v. U.S. Steel,* 394 U.S. 495 (1969); *United States v. Paramount Pictures,* 334 U.S. 131 (1948); *U.S. v. Loew's Inc.,* 371 U.S. 38 (1962); *International Business Machines Corp. v. United States,* 298 U.S. 131 (1936); *International Salt Co. v. United States,* 332 U.S. 392 (1947); *Standard Oil Co. of Calif. v. United States,* 337 U.S. 293 (1949); *Atlantic Refining Co. v. Federal Trade Commission,* 381 U.S. 357 (1965).

dealers, that then it should find that the program (which this Court had held to be a violation of Section 5 of the Federal Trade Commission Act) also constituted a violation of Section 1 of the Sherman Act. The jury found in favor of petitioners and awarded damages in the amount of $2,600.00. The Court of Appeals reversed and entered judgment for respondent.

The fourth and final claim is under 15 U.S.C. 13a, the Robinson-Patman Act. Petitioners contended that throughout the four year damage period (15 U.S.C. 16b) respondent sold gasoline to a Texaco branded chain retailer called Flinco, Inc., operating 12 stations in Salt Lake City, at four cents (4¢) per gallon less than the price at which respondent sold gasoline to petitioners, that there was no justification for this difference in price, and that the discrimination was reflected in the resale price of gasoline at petitioners' and the Texaco branded Flinco stations, with the result that there were large shifts in business (gallonage) from petitioners' to the Flinco stations. Relying upon the statement of this Court in *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947)[3] and the recent Ninth Circuit case of *Fowler Manufacturing Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), cert. denied 396 U.S. 1012 (1969), the District Court instructed the jury that damages, if any, should equal the amount of the discrimination times petitioners' volume if the jury found that

[3]"For despite petitioner's plaint on the difficulty of proving damages, it would [in a treble damage action] establish its right to recover three times the discriminatory difference without proving more than the illegality of the prices. If the prices are illegally discriminatory, petitioner has been damaged, in the absence of extraordinary circumstances, at least in the amount of that discrimination." *Bruce's Juices v. American Can Co.*, supra, at p. 757.

that amount exceeded the amount of the value of trade diverted by reason of the discrimination.

Upon the Robinson-Patman claim the District Court directed a verdict in petitioners' favor upon the commerce issue, relying on *F.T.C. v. Standard Oil*, 340 U.S. 351 (1950), wherein this Court held discriminatory sales all occurring within Detroit, Michigan to be in commerce upon the flow of commerce theory, and also directed a verdict in petitioners' favor upon respondent's good faith meeting of competition defense. The District Court submitted to the jury the issues of discrimination, the fact of competition between petitioners' and the favored customer's stations, injury to competition, and damage if any. The jury awarded damages in the amount of the discrimination,[4] equalling $597,011.00 actual damages. The Court of Appeals held that the discriminatory sales were not in commerce, reversed, and entered judgment for respondent.

B. Facts relevant to the questions presented.

1. The Horizontal Price Fixing Claim

The pertinent facts on the horizontal price fixing claim are the following: Texaco and the other major oil companies operating in Salt Lake,[5] alleged in the complaint

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[4]Petitioners also offered damage evidence based on a diversion of trade theory. The Court of Appeals did not reach the damage issue and therefore did not determine whether, if the amount-of-the-discrimination measure was incorrect, petitioners are entitled to a new trial on the diversion theory.

[5]They are American Oil Company, Continental Oil Company, Standard Oil Company of California, Phillips Petroleum Company, Union Oil Company, Gulf Oil Company and General Petroleum Company (Mobil) (T. 115; 1227). ("T." refers to pages of the reporter's transcript of the trial.)

to be co-conspirators, controlled approximately 85% of the Utah market for gasoline (Texaco Answers to Interrogatories, 4/2/68, p. 3). Each company has a set of exclusive branded dealers such as petitioners through whom gasoline is sold to the public (T. 106-7; 1453-57). There is no negotiation between the oil company and its dealer as to what the price will be (T. 107-8; 1462). The "normal" price of gasoline to all dealers is 26.8 for regular and 30.3 for premium and the normal price in sales by dealers to the public was 32.9 for regular and 36.9 for premium (T. 106 *et seq.*). From time to time the price to dealers is lowered by temporary allowances to permit dealers to lower their resale price to meet price reductions at the dealer level (T. 111; Pls. Ex. 12a-g; Defs. Ex. 81). When the necessity of temporary price allowances ceases, the allowances are withdrawn and prices return to the then normal level of 26.8 and 30.3 (Pls. Ex. 12).

Texaco and the other major oil companies are parties to a nationwide agreement to give and receive, or exchange, precise information as to all temporary allowances to all dealers within a given market (T. 95-131; 170-1; 1409-63; Pls. Ex. 3; Pls. Ex. 12a-g). Typically when Texaco observed a lower retail price at a competitor major branded station, its Salt Lake personnel would telephone the competitor major supplier to determine whether the latter had extended a temporary price allowance to the dealer or dealers posting the lower retail price (*ibid.*) If there was no allowance Texaco would be so informed and would continue to observe the situation but would take no action (T. 112). If the competitor had

granted a temporary allowance, it would inform respondent of the time the allowance went into effect, the particular stations to which it applied, and the precise amount of the allowance. This information was recorded by Texaco on forms prepared for the purpose, called Statements of Competitors Prices, S-20's (T. 109 *et seq.*; Pls. Ex. 3). A Statement of Competitors Prices indicates the normal tankwagon price (26.8 and 30.3), the name of the competitor or competitors granting the allowance, the market share of the competitors and Texaco's market share, the amount of the allowance, the location of the dealers to whom it was applied, and the effective date of the allowance (Pls. Ex. 3). In Texaco's case if two of the top three marketers in a given area had granted an allowance, the Texaco district manager would recommend in writing to the Denver regional manager that Texaco meet the allowance, appending the Statement of Competitors Prices (T. 95-131; 170-1; 718-19; 1409-63; Pls. Ex. 3; Pls. Ex. 12). Written approval was routinely granted. Texaco would attempt promptly to ascertain when an allowance had been *withdrawn* by a major competitor. This information, i.e. a raising of prices and the related pertinent information was likewise obtained directly from the competitor, and was recorded on the S-20's (e.g. T. 117). In the case of withdrawal of an allowance, the local Texaco manager would recommend in writing the upward price move on the strength of such a move by only one of the top three marketers, and approval likewise was routinely given. If prices held, no further action was necessary; if they did not the procedure described above was followed for reinstatement of

the temporary allowance. The Court of Appeals made no reference to the fact that the price exchange applied also to upward moves, a fact which petitioners emphasized in the briefs and at argument.

Texaco gave as well as received price information, although the interval of giving information was less frequent in Salt Lake than that of receiving it, since Texaco was not one of the three leading marketers in Salt Lake (T. 95-131).

The testimony was that the price exchange has been in effect for decades, that it is of nationwide application, and that all of the major integrated oil companies are parties to it (*ibid.*).

On the subject of the price exchange see generally the testimony of James Pullos (T. 95-172) and John Rogers (T. 1409-1553), both of Texaco.

On the subject of the geographical extent of a price allowance, the American Oil Company used a price zone map of Salt Lake City, dividing the area into seven zones for purposes of pricing to dealers. Texaco obtained from American copies of its zone map and used it in the local and regional offices of Texaco (e.g. T. 119-120). Instead of drawing its own zones, Texaco adopted American's zones (e.g. T. 1420 *et seq.*). In requesting and authorizing a price allowance or withdrawal the geographical extent thereof was invariably described by reference to American's zones (T. 1409-63).

So-called independent marketers and local refiners and sellers are not parties to the exchange agreement or procedure (e.g. T. 115; 118).

There was evidence that prior to the damage period representatives of several oil companies, including American Oil and Continental Oil Co., two of the top three marketers in Salt Lake (T. 102), met from time to time at Keeley's Coffee Shop in Salt Lake and agreed to use their best efforts to restore gasoline prices (T. 631-640). There was also evidence that such efforts were made and were successful (*ibid.*). The evidence did not disclose that Texaco attended these meetings, but only that it would be contacted. It is clear however that American and Continental, whose price moves Texaco closely followed through the exchange practice, were parties to that violation (T. 631-640).

Texaco's marketing guides provide that in the event direct price exchange with competitors is for any reason not possible, the decision to grant or withdraw price allowances should be made on the basis of retail price conditions (Pls. Ex. 12, p. 6, paragraph A3). This matter presents the possibility that Texaco might respond to the action of a dealer as opposed to that of a competitor oil company. It also leaves to the judgment and discretion of marketing officers the matters of the amount of the allowance, the number of dealers to whom it should be extended, and the duration thereof. There was never any occasion to use this procedure in Salt Lake City (T. 127; T. 1922).

In proof of impact and damages upon the horizontal price fixing claim, petitioners were unable to compare prevailing prices in the case at bar with those of another period or in another market where the price exchange did

not operate, the proof being that the exchange has operated nationwide and for decades (T. 127; 1432).

However, petitioners were able to show:

1) That in the absence of the exchange, prices must be determined by respondent on the much different basis of retail price conditions (T. 1444, 1446, 1448; Pls. Ex. 12b, p. 6, paragraph A3);

2) That the price exchange limited price reductions to the a) level, b) stations or geographical area, and c) duration established by the competitor (*ibid.*, also T. 95-131; 1409-63);

3) That without cost justification respondent was able to sell the identical product at a substantially lower price (4¢) at the same time in the same market (T. 226:7; 379);

4) Dealers of the favored customer were able to obtain respondent's gasoline at 2¢ per gallon cheaper than petitioners were (T. 243-4), and for this reason one of petitioners, Darrell Herzog, attempted, unsuccessfully, to become a Flinco dealer (T. 962, 5);

5) Prices were at the maximum level, tankwagon, for over half of the period, and averaged for the period within 2¢ of the maximum (Pls. Ex. 38);

6) That respondent's and the other majors' differential for regular and premium was at all times static (i.e. the difference in the price to the dealer of regular and premium is always 3½¢ per gallon regardless of market conditions), supporting the inference that the differential is not subject to the forces of supply and

demand and is artificially stabilized (Pls. Ex. 12b, p. 13; Pls. Ex. 38).

2. The Vertical Price Fixing Claim

The vertical price fixing claim was based on respondent's use of strategically located consignment and, post-*Simpson*, agency[6] stations, the practice of raising and lowering the price to the dealer and contemporaneously "advising" him and all of his competitors of the same brand by telephone of the new "recommended retail

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[6]An agency station is the Simpson (*Simpson v. Union Oil Co.*, 377 U.S. 13 (1964)) consignment station with a few minor changes (T. 1261; Defs. Ex. 131). Respondent's transparent circumvention of holdings of this Court appears throughout the record. Thus as indicated above the agency is merely a modified form of the consignment "charade," as it has recently been called. *Lehrman v. Gulf Oil Company*, 1972 Trade Cases ¶73,888 (5th Cir. 1972) and resale prices are as effectively fixed as they were under the consignment program (T. 1261). Respondent's answer to *FTC v. Texaco*, 393 U.S. 223 (1968) is to insert itself in the chain of distribution as a buyer and reseller of TBA to Texaco dealers. It still performs no function of manufacture, transportation or storage, still collects a large unearned tribute on the sale of those items to Texaco dealers, and Texaco dealers still must risk the displeasure of Texaco if they will buy TBA not "sold" by Texaco (T. 1559). That this Court's holding in the Standard stations case, *Standard Oil Co. of Calif. v. United States*, 337 U.S. 293 (1949) has stood for naught in the business of petroleum marketing is also clear from this record. Instead of requiring dealers to sell exclusively the gasoline of the supplier companies, which practice in the circumstances was held to violate Section 3 of the Clayton Act in the Standard Stations case, respondent has removed this provision from its dealer contract and inserted a provision that if non-supplier landlord gasoline is sold on the dealer's station, the dealer must first remove therefrom all insignia and trademarks of the supplier-landlord (e.g. Defs. Ex. 11, para. entitled "Trademarks and Brands"). He must; in effect, repaint his station. This provision had rendered all major branded dealers as completely inaccessible to all suppliers, major or independent, except a single supplier-landlord, as did the more direct condition of exclusive dealing (T. 106-7). In short, the practical restraints and anti-competitive practices sought to be outlawed in those cases survive under new forms.

price." The "recommendations" as to the price level dealers ought to follow occurred in the context of inherent coercion, one year leases and the dealers' complete dependence upon the supplier for gasoline.

The jury found no damages on this claim and neither party appealed. However, the jury's finding of resale price fixing underscores the fact that the effect of the horizontal price fixing among the oil companies is not blunted by dealer competition but is visited directly upon the public.

8. The Tie-In Case

The same "commission override" program for TBA which this Court struck down under Section 5 of the Federal Trade Commission Act in *F.T.C. v. Texaco, Inc.*, 393 U.S. 223 (1968) was in operation throughout the four year period in Salt Lake City. The agreements go back to the forties and the parties thereto are Texaco and certain major rubber companies, including Firestone and B. F. Goodrich (Pls. Exs. 30, 31). The agreements provide that Texaco will sponsor the sale of the rubber company's products, primarily tires, to Texaco dealers, in exchange for which it received a commission of from 7% to 10% on all such sales. Texaco's pre-existing sales personnel (called retail representatives) (T. 1486) worked with agents of the rubber companies in familiarizing dealers with the products involved, advising dealers of the need to stock such products, and taking purchase orders. Respondent performed no real economic service in the manufacture, transportation or storage of the sponsored items in exchange for its commission (T. 381-93; 1483-9; 1556-7).

The recommendation to dealers that they purchase the sponsored items occurred in the context of the dealers' complete economic dependence on respondent (T. 1482; 1346). Service station leases were for a term of only one year[7] and dealers rely upon respondent for their principal item, gasoline. Also part of the program was respondent's policy that non-sponsored items could not be placed on the motorist's Texaco credit card (T. 391; 1550).

The jury found that identical products were available to dealers under other programs at as much as five percent (5%) cheaper (T. 1561; 1568), and fixed this as the measure of damages for those of petitioners whose records were still available.

4. The Robinson-Patman Act Claim

a. Commerce

In this case all the discriminatory sales took place within Salt Lake City, just as in *F.T.C. v. Standard Oil,* 340 U.S. 531 (1950), all of the discriminatory sales took place in Detroit, Michigan. Since Texaco does not have a refinery in Utah it has entered into a purchase and sale agreement with the American Oil Company, which has a refinery just outside Salt Lake City (T. 508; 205; 353; Texaco Answers to Interrogatories 1/31/68, No. 1, 2, 3; Pls. Exs. 1 and 2). These agreements and the numerous letter amendments thereto are all in evidence as Pls. Exs. 1 and 2. The agreements were performed as written (T. 511-13; 516). Basically their terms are as follows:

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[7]Texaco did not sign the consent decree which ended the abortive West Coast oil case, wherein the government unsuccessfully sought to divorce the major oil companies from marketing. The other companies agreed inter alia to give dealers three year leases, 1959 Trade Cases ¶69,399; 1958 Trade Cases ¶69,212.

1) Texaco will sell crude oil produced by it in Colorado to the American Oil Company, delivery to be made at Iles Station, Colorado;

2) American will transport the same by pipeline to its refinery near Salt Lake City, Utah;

3) American will refine the same and sell it to Texaco at Salt Lake.

How are quantity and price determined? The amount of crude oil which Texaco promises to sell in Colorado equals 1300 barrels a day (a minimal figure) plus such additional amount of crude as will precisely offset the amount of refined products required by it in Salt Lake City (Pls. Ex. 2, pp. 9-10). Thus the amount of refined product which Texaco needed at Salt Lake directly controlled the amount of crude oil which it sold in Colorado (Pls. Ex. 2, pp. 9-10; letter amendment to Ex. 2, dated 11/8/66). (". . . and the remaining estimated quantities of refined products shall determine the estimated quantity of Rangely Crude Oil to be sold hereunder." Pls. Ex. 2, p. 10). There are letter amendments in evidence reflecting actual adjustments of quantity of crude sold by reason of revised estimates of need for refined products (letter amendments to plaintiff's exhibit 2, dated 5/23/66; 11/8/66; 11/10/66; 5/19/66.

While the quantity of refined needed at Salt Lake controlled the quantity of crude oil sold in Colorado, the price of the crude directly affected the price at which American sold refined products to Texaco at Salt Lake (Pls. Ex. 2, p. 5; T. 511-12; 519). The price Texaco paid for gasoline in Salt Lake was affected by three factors; the price at which it sold crude in Colorado; labor rates at Ameri-

can's Salt Lake refinery and Texaco's Casper, Wyoming, refinery, and the price of TEL, an ingredient in gasoline. (Ex. 2, p. 5).

Respondent does not dispute that refined gasoline cannot be produced except from crude oil, and that crude oil is commercially useless unless it is refined.

Texaco's sales of gasoline in the Salt Lake City area alone increased from fifteen to twenty-two million gallons a year between 1963 and 1966, and from two and one-half million dollars ($2,500,000.00) to roughly three and one-half million dollars ($3,500,000.00) in those years (Exs. 5 and 6 to Texaco Answers to Interrogatories, 3/4/68). Thus the amount of commerce subject to the exchange agreement is not de minimus.

Respondent's overall pricing policies emanate from New York (T. 395-6; 352; Pls. Exs. 12a-h) and are supervised for Salt Lake by the Denver regional office (T. 1418). Thus in this case there was no Texaco officer or agent in Utah who had authority even to grant a temporary price allowance, upward or downward, on gasoline, without written authority from some person outside the state (T. 1273; Pls. Ex. 12). The basic gasoline price, the tankwagon, is a nationwide price of all oil companies and in the case of Texaco, is determined in the New York marketing offices (Pls. Exs. 12a-g). Temporary deviations therefrom in any state in the nation could only be done with written approval from one of the six regional offices. The so-called jobber price, which in this case was the discriminatory, lower price to the chain retailer, is determined by a fixed allowance, approximately 4¢, off the tankwagon (Pls. Exs. 5, 6; T. 1873-93), likewise in the New York

office and with nationwide application.[8] Thus both of the discriminatory prices in this case are of nationwide origin.

There are a number of other instances of use of the instrumentality of interstate commerce in the record. Thus invoices for gasoline sold to Flinco the favored customer provide that checks are to be made payable to Texaco, Inc. and forwarded to its division officer in Denver (Pls. Ex. 10). In the supply agreements between respondent on the one hand and petitioners and the favored customer on the other, pursuant to which the discriminatory sales were made, respondent's place of business is listed as Denver, Colorado, to which payment by the favored customer was remitted (Pls. Exs. 5, 6, 10; Defs. Exs. 11, 120, 121). Respondent is a Delaware corporation with its principal place of business in New York. It is the largest seller of gasoline in the United States (T. 352; 409) and operates a nationwide advertising and credit card system.

Finally, refined product purchased at Salt Lake is sold by respondent at points in Colorado, Wyoming, Nevada and Idaho, as well as in Utah (Pls. Ex. 2, letter amendments 1/14/64; 1/24/64; 6/1/66).

It is pertinent to underscore certain facts bearing upon commerce which the Court of Appeals ignored or at least omitted from its opinion, despite emphasis in the briefs and argument below. The most important of these is the close interdependency between the sale of crude in Colorado and the purchase of refined in Utah (Pls. Ex. 2,

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[8] "The sole authority for eventually approving the margin for distributors rests in the headquarters of the sales department in the U.S. in New York." Testimony of George Glenn of Texaco, T. 1875.

passim). As the purchase of refined increases, the sale of crude increases in direct proportion. It may truly be said that the interstate shipment of crude depends directly upon estimated local requirements of refined, in support of the flow of commerce theory. Another key fact omitted from the opinion below is the nationwide character of the discriminatory prices in suit (Pls. Ex. 12) as well as the fact of interstate payment by Flinco (Pls. Ex. 10), which alone would appear sufficient to make one of the discriminatory sales in commerce.

b. The Merits of Petitioners Robinson-Patman Act Claim

Upon the merits of the Robinson-Patman claim, the facts present a classical violation. Petitioners each operate a single station and purchase gasoline at 26.8 and 30.3. Flinco, Inc. controlled 12 stations. Of these, 9 were operated continuously or for substantial periods by Flinco personnel, and 3 were operated by sub-lessees responsible to Flinco (Pls. Exs. 15, 21, 21a; T. 231-240; 726-7; 179; 1203-4, 6, 8). Flinco leased 8 of its stations from respondent (Texaco Answers to Interrogatories 3/4/68; T. 1366). Each of petitioners, except Darrell Herzog who owned his own station, leased from Texaco.

Whereas petitioners paid a normal price of 26.8 and 30.3, Flinco paid a normal price of 23.5 and 26.5. Taking allowances into account, Flinco's price throughout the four year period (15 USC 16(b)) averaged 4 cents per gallon below petitioners for both regular and premium (Pls. Exs. 23, 23a).

Flinco utilized the discrimination to undersell petitioners in sales to the public, at both its dealer operated

stations and the stations which it operated itself, the differential for substantial periods of time being the full 4 cents per gallon (T. 241; 320; 321; 424; 668; 735; 781; 962; Pls. Exs. 21, 21a, 22).

Flinco's gallonage increased dramatically in the damage period from 2.5 million gallons in 1964 to nearly 7 million gallons in 1967. (Pls. Exs. 10, 25).

The incipient injury to competition reached maturity in 1967, in which year each of petitioners (except Daniels and Jarding) lost substantial gallonage from the previous year, while Flinco's gallonage continued its sharp increase (Pls. Ex. 23a, p. 3; Pls. Ex. 13).

The gasoline sold at Flinco's and petitioners' stations is physically the same (T. 178; 379) and the Flinco stations were indistinguishable in appearance from petitioners' stations, both being "Texaco branded" stations (T. 179-80; 198; 236; 450; 667; 681; 1209-10).

Respondent interposed the defense of meeting competition. In this regard there was no evidence whatever of "bargaining and haggling" between respondent and Flinco, and the price to Flinco was merely the nationwide jobber price which respondent and all major oil companies extend to customers which they classify as jobbers (T. 1214-25; Pls. Ex. 26; T. 1506; T. 175; 177; 209-10; 1873-1893). In no sense was respondent's price to Flinco a departure from a non-discriminatory price level occasioned by threatened loss of a customer to a competitor, and respondent's representatives admitted that respondent's price to Flinco was not occasioned by any offer which a competitor of respondent had made to Flinco, and they

testified they had no knowledge of any such offers (T. 1504-5; 209-10).

The defense of cost justification was expressly waived by respondent in the pleadings and at pre-trial, where respondent stated that it would not offer that defense (T. 51 (Hearing of 9/21/70)).

However, at the trial respondent offered evidence not related to Flinco at all, but to wholesalers generally, in support of the proposition that the discrimination was a "functional discount" (See generally the testimony of Bickel and Glenn of Texaco). In this regard there was evidence that wholesalers perform functions which retailers do not and that respondent must absorb the cost of such functions in sales to retailers. This cost was never related to the facts of this case or quantified in terms of cents per gallon or by any other measure (T. 403). The cost did not involve trucking, for which Flinco was compensated over and above the discrimination (Pls. Ex. 10). As noted above, Flinco was a retailer as well as a wholesaler, and several of respondent's representatives admitted this (e.g. T. 1495; 181; 1201-2; 726-7; 1942). The Court of Appeals recognized that the evidence upon this unprecedented defense did not account for the full discrimination, and recognized the discrimination for what in fact it truly was, a "bulk discount" (Appendix A, p. 6). Finally, the evidence showed that Flinco did not possess any storage facility of greater capacity than that found on each of petitioners' stations (T. 232; 284).

As hereinabove noted, the jury awarded damages in the amount of the discrimination, upon proof that peti-

tioners were in actual competition with Flinco, and that the anti-competitive discrimination was not justified.

VII. REASONS FOR GRANTING THE WRIT

A. PETITIONERS STAND IN THE SHOES OF SOME 250,000 OTHER MAJOR OIL COMPANY PETROLEUM RETAILERS IN THE COUNTRY, WHICH CLASS IS IN NEED OF PROTECTION OF SUCH RIGHTS AS THE ANTITRUST LAWS MAY CONFER UPON THEM IN THEIR RELATIONSHIP WITH THE MAJOR OIL COMPANIES.

It is important to note that the relationship of petitioners to respondent Texaco is no different from that of the rest of the 40,000 Texaco dealers (T. 409) in the United States to Texaco, or that of the other some 250,000 major branded dealers to their suppliers. The imposition of substantial treble damage liability in favor of these fifteen dealers will for the future[9] secure the rights under the antitrust laws of other dealers and of the public in at least two important respects:

1. The elimination of direct price communication among the major oil companies;

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[9]In the trial Court respondent elicited the testimony of a Texaco attorney to the effect that the price exchange procedure, that part of this case which could generate considerable litigation, was carried on in the belief that such procedure was somehow approved by this Court in *F.T.C. v. Staley*, supra, and other cases. Indeed respondent admits that it has not desisted from the price exchange even after *Container* (T. 2041-2). In other words respondent has invoked the "equities" defense of *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), 396 U.S. 13 (1969). It is submitted that these contentions are without merit. However that may be, it is clear under *Simpson* that in the event these petitioners ultimately prevail in this case, they are entitled to the benefit of their victory, whatever may be the rule for other cases. *Simpson v. Union Oil Co.*, supra; Cf. *Linkletter v. Walker*, 381 U.S. 618 (1965) and cases cited therein.

2. The elimination of discrimination in price between dealers and "wholesalers" who operate service stations and in fact compete with dealers.

The Congressional purpose to secure compliance with the antitrust laws by the imposition of treble damages should be effectuated in this case, especially where an integral part of the petroleum marketing mechanism is a class of 250,000 potential claimants. The public has no power whatever against the oil companies. However, gasoline dealers do.

The amount of private litigation in the last decade by gasoline dealers against their major oil company suppliers begins to rival in volume the treble damage cases following *U.S. v. Paramount*, 334 U.S. 131 (1948). Unlike many motion picture claimants, however, the dealer loses his case. The only case known to petitioners where a judgment for damages in favor of a dealer has been affirmed is *Osborn v. Sinclair Refining*, 324 F.2d 566 (4th Cir. 1963), and that only on the second trip to the Court of Appeals.

It has been observed by the Seventh Circuit that gasoline dealers are economic serfs *(Goodyear v. F.T.C.*, 331 F.2d 394 at p. 400 (7th Cir. 1964); aff'd 381 U.S. 357 (1965). This is quite true. For the most part they are independent personalities pursuing the notion of having their own businesses and being their own boss. For this many work seventy hours a week (e.g. T. 992) often for a net income in the range of $6,000.00 (e.g. T. 995), even though their sales of gasoline remitted to the supplier may exceed $200,000.00 (Pls. Ex. 20a). The recent spate of litigation reflects a very real discontent with basic abuses

in the dealer-supplier relationship. The verdict of Thomas Belliston after 26 years with Texaco was to sue.

It is therefore important that such rights as the anti-trust laws confer upon gasoline dealers be jealously guarded and upheld by the Courts.

B. THE COURT OF APPEALS HAS ERRONEOUSLY DISTINGUISHED CONTAINER CORPORATION v. U.S., 393 U.S. 333 (1969), AND HAS JEOPARDIZED ANY FUTURE APPLICATION OF THE HOLDING OF THAT CASE IN THE FEDERAL COURTS.

In this case, the purpose and effect of the price exchange was not compliance with Robinson-Patman but was to restrain lower prices, in terms of price level, geographical spread, and duration. Without the price exchange the oil companies would not know with certainty the amount of a major competitor's price allowance. The tankwagon price may be well known, but the precise amount of an allowance, for example, by American Oil Company to its dealers located in zone 7 of Salt Lake City, and the exact moment when the allowance became effective for those specified dealers cannot be ascertained except through the mechanism of the price exchange (T. 95-131; 1409-63; Pls. Ex. 3; Pls. Ex. 12b, p. 5 *et seq.*).

In the absence of the exchange the Texaco pricing authorities are guided only by the purpose of maintaining Texaco's existing share of the market (Pls. Ex. 12b, p. 5 *et seq.*). This can only be estimated since gallonage figures are available only at 30 day intervals.

Thus assuming no price exchange, and assuming that a number of competitor major dealers have lowered their

retail prices whether initially or in response to independent dealers the following dichotomy appears:

Prices Based on Exchange with Competitors (e.g. T. 95-131; 1409-63):	Prices Based on Retail Conditions With the Sole Guide Being the Maintenance of Market Shares (Pls. Ex. 12b, p. 5 *et seq.*, a Texaco marketing circular):
1. Even though the competitive dealers' prices are lower, Texaco makes no price move for its dealer unless the competitor supplier has lowered his price.	1. When gallonage may be affected Texaco lowers its price to maintain gallonage.
2. If the major supplier has lowered his price 1.5¢ per gallon, Texaco lowers its price 1.5¢ per gallon.	2. When gallonage may be affected Texaco lowers its price to permit its dealers to maintain gallonage. The price allowance, if any, may be more or less than 1.5¢ per gallon.[10]
3. If the major competitor has extended the allowance to dealers within a certain zone within a metropolitan area, Texaco extends the allowance to its dealers within that zone.	3. When gallonage may be affected, the allowance is to be extended to all Texaco dealers who in management's judgment are in actual competition for patronage.
4. When the competitors prices are made retroactively effective as of a certain time, Texaco's prices are made effective as of that time.	4. When gallonage may be affected, the allowance is to become effective at such time as appears necessary in management's judgment to prevent loss of gallonage.
5. When the competitors raise their price Texaco raises its price to the same level, effective for the same time.	5. Prices are not raised until in the judgment of management it appears that Texaco will not lose gallonage by doing so.

[10]Perhaps the most striking example of parallel conduct in the record, hardly explained as a coincidence or even as the result of the forces of an undifferentiated oligopoly, is the identity of

All of this applies as well to successive downward moves and successive upward moves. Also, without the exchange procedure only by the sheerest coincidence could it happen, as it did here that Texaco and one or more of its competitors at the same time would make premature upward moves which did not hold.

It is submitted that if *Container* has no application here, it will have no further application at all in the lower Courts.

C. THE COURT SHOULD REVIEW THE COURT OF APPEALS HOLDING THAT THE PRICE EXCHANGE AGREEMENT WAS NECESSITATED BY COMPLIANCE WITH THE ROBINSON-PATMAN ACT.

Respondent interprets this Court's opinion in *F.T.C. v. Staley*, 324 U.S. 746 (1945) to mean that "price verifica-

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the price allowance programs among the majors. Thus when the normal retail is 32.9 for regular the normal price to the dealer is 26.8. (Unlike the price to the dealer, the retail price for all companies raises and falls only in increments of a full cent, two full cents, etc., and never in a fraction of a cent.) Thus the dealer's gross margin at normal levels is 6.1¢ per gallon for regular. When the retail price drops by 1¢ to 31.9, the price to the dealer for all companies drops by three quarters of a cent (.0075) to 26.05 and the dealers margin is decreased by one quarter of a cent (.0025) to 5.85. When the retail price drops another cent to 30.9 the same formula applies and the price to the dealer drops again by only .0075 to 5.10, decreasing the dealers margin by another .0025 for a margin of 5.60, and so forth. When the dealer's margin has been reduced to 4.0¢ per gallon, the "downstop" has been reached, and every further decline of 1¢ in the retail price is met by a 1¢ decline in the price to the dealer (Pls. Ex. 3; Pls. Ex. 12b, pp. 13, 14). That this intricate program should be the same for most of the major oil companies presents very cogent circumstantial proof of a conspiracy to fix prices, *Container* aside. With the exchange of price maps and the uniform system of exclusive dealerships as well as direct price communication, petitioners unsuccessfully contended on rehearing in the Court of Appeals that even if *Container* was not controlling the facts presented a case for the jury under the less specialized, general theory of conspiracy to fix prices.

tion" with competitors, however routine it may be, is justified by respondent's attempt to avail itself of the good faith meeting competition defense of the Robinson-Patman Act. This view has been espoused by the Court of Appeals in this case (Appendix A, pp. xv-xvi) and by at least two District Courts. *Wall Products Co. v. National Gypsum,* 326 F.Supp. 295 (N.D. Calif., 1970); *Webster v. Sinclair Refining Company,* No. 5673-69-T (Ala., August 3, 1971). In so doing respondent ignores the threshhold inquiry of whether the meeting competition defense applies at all to anticompetitive discriminations among dealers[11] for the purpose of meeting the competition of another major's dealers, which point was expressly left undecided in *F.T.C. v. Sun Oil,* 371 U.S. 505 at p. 512, footnote 7 (1963).

There was testimony, however, that the price exchange practice has been in effect since long before *Staley* and even before passage of the Robinson-Patman Act in 1936 (T. 1922-25).

Respondent risks no liability to its customers under the Robinson-Patman Act if it sells all competing customers at the same price. In the case of dealers, to which the price exchange program applies, liability may arise when respondent discriminates among competing dealers, assuming that the discrimination among dealers is large enough and of sufficient duration to cause a potential anticompetitive effect. When this occurs, the conduct escapes

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[11]The price exchange applies only to dealer prices. Allowances to jobbers are usually fixed in a certain ratio to dealer allowances. Here jobber allowances equal 70% of dealer allowances. (Pls. Ex. 12b).

liability only if the meeting competition defense is available. Respondent therefore "verifies" its competitors' price to competitor dealers, and meets that price in discriminating among its own dealers.

It is apparent that the question left unanswered in Sun Oil[12] should be resolved by this Court against the availability of the defenses. Meeting competition is a plenary defense even to anticompetitive discriminations. *F.T.C. v. Standard Oil,* 340 U.S. 231 (1951). In enacting the defense, Congress intended that the free forces of competition and the policy of the Sherman Act not be restrained by the Robinson-Patman Act, and that a seller always be free to lower his price to retain a customer or gain a new one. This Court has fully effectuated that purpose and has upheld the defense where it appeared that without the discrimination defendant seller would have lost valuable customers. Thus in *F.T.C. v. Standard Oil,* 355 U.S. 396 (1957) this Court upheld Standard's defense of meeting competition, which was based on amply supported findings of bargaining and haggling between Standard and chain retailers who owned their own stations and bulk plants and who would as soon switch to another oil company if Standard did not meet the market price.

However, the typical gasoline dealer such as petitioners and such as was supposed in the footnote in *Sun Oil* is not at all comparable to the Detroit jobbers. The typical

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[12]"Were it otherwise, i.e., if it appeared either that Super Test were an integrated supplier-retailer or that it had received a price cut from its own supplier—presumably a competitor of Sun—we would be presented with a different case, as to which we herein neither express nor intimate any opinion." *F.T.C. v. Sun Oil,* supra, footnote 7.

dealer is tied to his supplier by de facto exclusive dealing contracts and by the lease of the service station premises. He cannot go wherever the price is best, but must continue to buy his supplier's gasoline at the price dictated by the supplier. As the Court of Appeals recognized there is no negotiation between dealer and supplier as to what the price will be (Appendix A, p. xiv).

If at the end of his term he is dissatisfied he may leave, but what does he take with him? Unlike the Detroit jobbers who owned their own stations (173 F.2d 210 at p. 212 (Seventh Cir. 1949); 233 F.2d 649 at p. 654 (Seventh Cir. 1956)) and whose loss might be a serious concern to the supplier, the overwhelming number of gasoline dealers lease service station premises from their supplier (e.g. T. 108). When the dealer leaves, the station remains and the supplier, who need only find a new dealer, may, it is sad to say, have lost very little in a real economic sense. Thus the purpose of the meeting competition defense to enable a seller to retain customers even by anticompetitive discriminations should have no application in the oil company-dealer context. It is the station which is the oil company's customer, and it does not lose that customer even though the individuals who operate it may change from time to time, as often happens.

Furthermore, even assuming that meeting competition is properly invoked in the dealer context, still it cannot be a defense to a Sherman Act charge of price fixing. *U.S. v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940); *U.S. v. New York Great A & P Co.*, 173 F.2d 79 at p. 89 (7th Cir. 1949).

This Court should review the lower Court's determination that the meeting competition defense is applicable here and that it is also a defense to a Sherman Act charge.

D. THE EVIDENCE DISCLOSES A VALID ALTERNATIVE THEORY OF LIABILITY UPON THE HORIZONTAL PRICE FIXING CLAIM AND THE COURT OF APPEALS ABUSED ITS DISCRETION IN DECLINING TO ENTERTAIN PETITIONERS' MOTION UNDER FEDERAL RULES OF CIVIL PROCEDURE 50(d) FOR A NEW TRIAL, NECESSITATING SUPERVISORY REVIEW BY THIS COURT OF PETITIONERS' RIGHT TO A NEW TRIAL.

On the horizontal case, the District Court directed a verdict in favor of petitioners and against respondent Texaco. The Court of Appeals in effect decided precisely the other way, directing that judgment be entered in favor of Texaco.

In the District Court petitioners had proceeded upon a *Container* theory of liability and also upon the more general price fixing conspiracy evidentiary theory of conscious parallelism and "plus factors" (e.g. *American Tobacco Co. v. U.S.*, 328 U.S. 781 (1946)). The first is quite specialized and involves only proof of an 1) exchange of prices among 2) oligopolists selling, 3) a fungible product, where 4) prices are stabilized. *Container* appears to define a substantive offense designed to combat oligopoly pricing, not merely to list those elements of the proof which support a finding of conspiracy. In proof of the more general non-*Container* conspiracy, plaintiff shows certain consciously parallel conduct and plus factors, all circumstantial evidence, from which the trier of fact may

or may not infer the existence of a conspiracy to fix prices.

As indicated above in this petition, here such evidence was exceedingly cogent and was clearly sufficient to submit to the jury the issue of a combination and conspiracy to fix prices.[12]

Of course by moving for a directed verdict in the District Court, petitioners did not waive a jury trial (Federal Rules of Civil Procedure 50(a)). Also the fact that petitioners relied upon a particular theory in the District Court, namely *Container*, does not deprive them, if they prevail on that theory, and if the Court of Appeals subsequently reverses and enters judgment for defendant, of their right to a new trial upon a second valid theory of liability, precisely as if the District Court had granted J.N.O.V. instead of the Court of Appeals. If the theory first submitted is wrong (which petitioners of course do not concede) and there exists a second valid theory upon

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[12]That is, direct communication among competitors regarding price and related information, exchange of price zone maps and adherence to a map established by a competitor, uniform tankwagon prices, uniform price allowance programs, uniform jobber prices, uniform ratios of jobber allowances to dealer allowances, uniform exclusive dealing agreements, and a uniform system of recommending retail price changes to dealers and other vertical price fixing devices, such as agency stations. The fact that Texaco has a supply agreement with its competitor American is not without significance in this context. Also there was evidence that the price of crude oil was by agreement between Texaco and American left to the Phillips Petroleum Company, which also produced crude in the Rangely and Wilson Creek fields in Colorado. The clear effect of the price of crude upon the price of refined gasoline was shown by evidence. This evidence should be viewed as a whole and in the light most favorable to petitioners. *Continental Ore v. Union Carbide and Carbon Corporation*, 370 U.S. 690 at p. 696, footnote 6 (1962).

which petitioner might have and did in fact proceed until it was necessary after the evidence to make an election, then when petitioners favorable judgment is reversed, respondent should not receive a windfall and escape provable liability fortuitously, and petitioners should have a new trial upon its alternative theory. Federal Rules of Civil Procedure 50(d); *Weade v. Dichmann, Wright and Pugh*, 337 U.S. 801 (1948); *Neely v. Eby Construction Co.*, 386 U.S. 317 (1962).

Also, if under *Container* the District Court erred in directing a verdict, still if the matter is one which should have gone to the jury under that case, petitioners would therefore be entitled to a new trial.

The Court of Appeals did not require respondent to answer the petition for rehearing and summarily denied the petition. However, in the opinion the Court observes that, "On appeal, the dealers concede that this claim must stand or fall on the applicability of *U.S. v. Container Corporation of America*, 393 U.S. 333 (1969)." In one sense this is perfectly true. The District Court viewed *Container* as controlling and it directed a verdict thereon, and if the elements of *Container* were not undisputably present, as petitioners contended, the judgment could not be affirmed. However, the Court overleaps the next step: whether the jury could find a violation based on a *Container* instruction or upon general conspiracy instructions, viewing the evidence as a whole and in the light most favorable to petitioners. *Continental Ore v. Union Carbide*, supra. As appellant, Texaco did not raise the issue on appeal of course; nor did petitioners as the verdict winner present to the Court of Appeals in their main

brief all alternatives to judgment for respondent, in this case which presented at least a dozen issues. However, petitioners did squarely raise the issue upon a timely petition for rehearing. This has been held to be sufficient (*Neely v. Eby Construction Co.*, supra). There is nothing in the Federal Rules of Civil or Appellate Procedure or the Rules of the Tenth Circuit which warns the successful litigant of the Draconian rule which the Court of Appeals has applied here: that if the party seeking affirmance of a judgment of the District Court does not brief in the main briefs and argue its right to a new trial in the event of non-affirmance, then upon non-affirmance judgment will be entered for the party attacking the judgment of the District Court, notwithstanding that a timely petition for rehearing raising the right to a new trial has been filed. The fault of such a rule is that it does not do substantial justice to the parties, affords a windfall to respondent, and results in a judgment which is not based on the merits of the case, whereas its countervailing benefit to the expedition of the Court's business is negligible, given the existing right to a petition for rehearing.

This Court must therefore exercise its supervisory review to determine whether in the event of non-affirmance petitioners are entitled to a new trial upon the Sherman Act horizontal price fixing claim.

E. THE HOLDING OF THE COURT OF APPEALS ON THE COMMERCE ISSUE IN EFFECT EXEMPTS THE PETROLEUM INDUSTRY FROM SECONDARY AND THIRD LINE ROBINSON-PATMAN ACTIONS, AND CAUSES WHAT REMAINING APPLICATION THERE IS TO BE INCONSISTENT AND ARBITRARY. ALSO THAT HOLDING CLEARLY CONFLICTS WITH THE HOLDING OF THE MORE RECENT FIFTH CIRCUIT CASE OF LITTLEJOHN v. SHELL, ... F.2d .... (5th CIR., MARCH 22, 1972).

In the case of *F.T.C. v. Standard Oil*, 340 U.S. 231 (1950); 355 U.S. 396 (1957), the Commission attacked under Section 2a discriminatory pricing of gasoline by Standard to its dealers and jobbers in Detroit, Michigan. All the discriminatory sales took place within Detroit. The crude had been produced in various mid-continent states, refined in Indiana, thence shipped to Michigan where it was stored and thence sold at discriminatory prices in Detroit. In its opinion, 340 U.S. 231 at pp. 236-39, this Court also noted that Standard sold its gasoline in 14 mid-western states, and that shipments in interstate commerce were made pursuant to market demand in Michigan.

Here petitioners complain of discriminatory sales by Texaco in Salt Lake City. The crude is produced by Texaco in Colorado, sold there to American who transports it to its Salt Lake City, Utah refinery, refines it, and sells the refined product back to Texaco for sale by Texaco in Utah and in parts of the surrounding states of Idaho, Nevada, and Colorado. Shipments into Utah are made pursuant to Texaco's estimated need for refined product at Salt Lake, and actual adjustments of quantity were made from time to time on this account.

The Court of Appeals distinguishes *F.T.C. v. Standard Oil* on the ground that the flow of commerce ceases when the gasoline is refined in Salt Lake and also when the refined product is sold back to Texaco by American at Salt Lake.

It is important first to consider the practical effects to the administration of the Robinson-Patman Act of this distinction. It means that wherever commercial gasoline customers are supplied from a refinery located within the state, they cannot maintain a secondary or third line action under Robinson-Patnam and the F.T.C. could not maintain such an action on their behalf. It is important to note that in a secondary, third or fourth line action, the complainant disfavored customer cannot obtain relief unless he proves that he is actually engaged in competition with the recipient of the discriminatory, lower price. *F.T.C. v. Morton Salt*, 334 U.S. 37 (1948). Clearly a discriminatory lower price to dealers or jobbers in Colorado can have no effect upon dealers or jobbers in Utah servicing a different class of consumers. Thus few retailers and wholesalers can show discriminatory sales crossing state lines, and those only fortuitously in the case of border towns.

Hence the flow of commerce theory or the uses of the instrumentality of interstate commerce theory must be available if large classes of small retailers and wholesalers are to have the benefit of the Robinson-Patman Act.

To distinguish the Detroit jobber case as the Court of Appeals has done here, is to grant an exemption to Texaco and remove the protection of the Robinson-Patman Act

from its dealers in each of the thirteen states in which it has a refinery. It also grants the same exemption and removes the same protection in each of the remaining states in which Texaco is supplied, as here, from the refinery of another oil company. There was testimony that supply agreements among major oil companies are very common, and that where a major does not have a refinery in close proximity to a market, it will, as here, instead of transporting refined gasoline over long distances, enter into one kind or another of the various kinds of supply agreements available with its competitors. In each of those states, probably the majority of the remaining 37, it will also be exempt.

The distinction which the Court of Appeals invokes means in the light of *F.T.C. v. Standard Oil*, 340 U.S. 231 (1950), that if petitioners had been Texaco dealers in Boise or Burley (to which Texaco ships refined product obtained at American's Salt Lake refinery) they could seek relief from price discrimination in the Federal Court under the Robinson-Patman Act, but that as Texaco dealers in Salt Lake City they cannot. It means that Texaco must observe the Robinson-Patman Act in gasoline sales in Idaho but not in Utah. It means that those majors who transport refined gasoline into Utah are there subject to the Act, but that those who do not, Texaco, American, Continental, and Standard of California, are not subject to it. That a Union Oil dealer in Utah may sue but that a Texaco dealer cannot. It means, as hereinabove stated, that Texaco is exempt from Robinson-Patman in the 13 states in which it has a refinery and in all those other states where, as here, it is supplied from the refinery of a competitor.

Clearly, Congress did not intend that the Act have such arbitrary and inconsistent application.

An alternative distinction stated by the Court of Appeals is the sale of refined by American to Texaco, which sale is said to discontinue the flow of commerce. The Court cites no authority for this distinction, and it likewise is subject to the same infirmities of inconsistent application of the Act as is the crude-refined distinction, at least in those markets, as here, where the discriminating seller is supplied by an exchange agreement with a competitor. Why jurisdiction should depend upon whether the refinery is owned by defendant or by a competitor of defendant is not clear. Also this Court has traditionally in antitrust cases looked through formal arrangements to the substance and effect of what is done, *Simpson v. Union Oil Co.*, supra, and the sale by American to Texaco in Salt Lake in no way alters the physical continuous flow of goods in commerce from Colorado to consumers in Salt Lake, the fact of Texaco's interstate marketing program governing sales in Salt Lake, and the other uses by respondent of the instrumentality of interstate commerce in making sales in Salt Lake (See section 4a, supra, Statement of the Case).

The recent case of *Littlejohn v. Shell Oil Company*, ___ F.2d ___ (5th Cir., March 22, 1972) is in direct conflict with the instant case upon the jurisdictional scope of the Robinson-Patman Act. In *Littlejohn*, plaintiff was an independent dealer complaining under the Robinson-Patman Act of discriminatory lower prices in Garland, Texas, at competitive Standard and Shell stations, which were brought about by price reductions of the major suppliers of those competitors. All sales involved were sales of

gasoline, which for all of the stations in question had been refined and sold through resellers to the motorist all within the state of Texas, as here.

Applying the rationale used in the instant case, Littlejohn's case would surely have been dismissed for lack of jurisdiction, as indeed it was in the District Court. The Court of Appeals for the Fifth Circuit reversed, however, holding that plaintiff should have been permitted to develop evidence of the use of the instrumentality of interstate commerce and an interstate treasury and the effect of such use on the discriminatory sales of which he complained, citing *Moore v. Mead's Fine Bread*, 348 U.S. 115 (1954). Cf. *Burke v. Ford*, 389 U.S. 320 (1967); *Utah Pharmaceutical Association v. U.S.*, 371 U.S. 24 (1962).

The case at bar and *Littlejohn* cannot be harmonized and the conflict bears upon an important issue, namely the jurisdictional scope of the Robinson-Patman Act, and should be resolved by this Court. There is abundant support in the record for the conclusion that the sales here were "in commerce."

F. THIS COURT SHOULD DETERMINE WHETHER EVIDENCE OF A "FUNCTIONAL DISCOUNT" MAY CONSTITUTE A DEFENSE TO AN ANTICOMPETITIVE DISCRIMINATION OR WHETHER SUCH EVIDENCE MUST BE TENDERED UNDER THE COST JUSTIFICATION DEFENSE. THE OPINION OF THE COURT BELOW CONFLICTS IN PRINCIPLE ON THIS SUBJECT WITH THAT OF THE SEVENTH CIRCUIT IN MUELLER CO. v. F.T.C., 323 F.2d 44 (7th Cir. 1963).

An unresolved issue is the extent to which a "functional discount" operates as a defense, if at all, in a Robinson-Patman secondary or third line action. In this case the

Court of Appeals without citing any authority lends appellate authority to this defense. (Appendix A, p. iv).

The statute says nothing of functional discounts and lists only cost justification and meeting competition as defenses to anticompetitive price discriminations. Original versions of the bill would have exempted discrimination between wholesalers and retailers from the coverage of the Act,[14] however these provisions were deleted and the Act outlaws all anticompetitive discriminations not justified by the defenses stated.

In *Mueller Co. v. F.T.C.*, 323 F.2d 44 (7th Cir. 1963) the Seventh Circuit affirmed the Commission's rejection of the defense, observing that the discrimination there at issue was anticompetitive and had not been cost justified.

It would appear that any discrimination in favor of wholesalers and against retailers which the sellers conscientiously fixed to the particular situation to compensate wholesalers for functions not performed by retailers or to compensate itself for services which it provided free to retailers would not violate the Act. In such cases there can be no injury to competition due to the fact that the

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[14]—e.g. "That nothing herein contained shall prevent or require differentials as between purchasers depending solely upon whether they purchase for resale to wholesalers, to retailers, or to consumers, or for use in further manufacture; for the purpose of such classification of customers as wholesalers or jobbers, or retailers, the character of the selling of the purchaser and not the buying shall determine the classification, and any purchaser who, directly or indirectly, through a subsidiary or affiliated concern or broker, does both a wholesale and retail business shall, irrespective of quantity purchased, be classified (1) as a wholesaler on purchases for sale to retail dealers only, not owned or controlled, directly or indirectly, by the purchaser; and (2) as a retailer on purchases for sale to consumers."
H.R. Rep. No. 2287, 74th Cong., 2d Sess. 1-2 (1936).

favored wholesaler will resell to retailers at the same price[15] as other retailers purchase from the seller.

It would appear to be no great burden upon the seller, and on the other hand would greatly enhance competition, if the seller would particularize functional discounts. A trucking discount might be given for the approximate value of that service, a warehousing or storage discount for that, a credit discount for prompt cash payment, and so forth. The alleged functional discounts which respondent would rely upon to escape liability are not so vague and amorphous that they cannot be listed and an approximate value assigned to each. Were this done the seller would have little difficulty avoiding liability under the Robinson-Patman Act. He could readily prevail upon a showing that the discrimination was cost justified, or, with equal vindication, that the discrimination has caused no injury to competition.

In the case at bar the defense of cost justification was affirmatively waived at the pre-trial conference, respondent announcing that it would not rely upon that defense (T. 51). The jury's general finding of violation indicates that it found that the discrimination was anticompetitive.

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[15]Not every discrimination violates the Act. Some are *de minimis* in amount and some are of brief duration, so that no injury to competition results. *American Oil v. F.T.C.*, 325 F.2d 101 (7th Cir. 1964) cert. denied 377 U.S. 954. It is quite true that the Sherman Act forbids the seller from dictating the wholesaler's resale price. Still the choice is not, as respondent argued in the Court of Appeals, to unlawfully maintain prices or to forego using wholesalers who perform compensable functions. The point is that where the functional discount is reasonably related to compensable wholesaler services and a fair profit to the wholesaler, the wholesaler is economically prevented from selling to retailers at a price which is substantially below that at which the seller sells to retailers *and* for sufficient duration to cause an injury to competition.

The favored customer in this case, Flinco, was a hybrid wholesaler-retailer (e.g. T. 1942). Flinco purchased gasoline at 4¢ per gallon cheaper than did the petitioner-retailers (Pls. Ex. 23, 23a). Over and above this 4¢ per gallon difference was a .0005¢ per gallon trucking allowance which was separately stated on the invoice (Pls. Ex. 10). Flinco did not have storage facilities greater than those of the petitioner-retailers (T. 232-284).

Clearly as to those stations which Flinco operated and where it sold at retail, which practice, contrary to the statement of the Court of Appeals, was not done on a stop-gap basis, and for some stations continued throughout the period (T. 231-40), there is no different function for which a discount is in order. The evidence was that this naked violation seriously injured petitioners.

The Flinco officer testified that as to the wholesale arm of its business, that is, sales by Flinco to retail service stations, Flinco's practice year in and year out was to sell at the dealer tankwagon price less 2¢ per gallon (T. 243-44). That this also resulted in an injury to competition was found by the jury.

As hereinabove stated, the evidence showed that Flinco's gallonage rose from 2.5 million in 1963 each year to nearly 7 million in 1967 (Pls. Ex. 10, 25).

The trial testimony on the subject of functional discounts was not brought home to Flinco but related to all wholesalers generally (e.g. 1919). The New York Texaco executive who testified on the subject admitted that he knew very little about Flinco in particular, and then proceeded to list numerous functions which wholesalers generally might perform (T. 1861-74).

It may well be that there are some gasoline wholesalers who would be entitled to a 4¢ per gallon discount, but it is very clear on this record that Flinco, the favored customer, was not one of them. Respondent's price to wholesalers throughout the country is determined by the same formula, a set amount off the dealer tankwagon price (T. 1873-1893; Pls. Exs. 5, 6). Once a customer qualifies as a "wholesaler," he gets the wholesale price, regardless of his particular circumstances. Whether one is a "wholesaler" depends upon whether he purchases a minimum quantity of gasoline (Pls. Exs. 5, 6). It matters not that he stores the gasoline or that he does not store it, that he transports it or does not transport it, that he owns his own stations or leases them from the supplier (e.g. 1214:25; 209-10).

It is submitted that this broad brush uniform wholesaler discount is extremely destructive of competition. Not the least of its anticompetitive effects is its tendency to create uniform jobber prices among the major oil companies, as appears in the next section. In the case at bar the jury found that it also resulted in a crystal clear violation of the Robinson-Patman Act.

This Court should review the Court of Appeals opinion on the subject of functional discounts.

G. THIS COURT SHOULD RE-EXAMINE AND CLARIFY THE SCOPE OF THE MEETING COMPETITION DEFENSE WHICH WAS UPHELD IN F.T.C. v. STANDARD OIL, 355 U.S. 396 (1957).

Respondent raised the meeting competition defense to petitioners' price discrimination claim in the District Court and that Court held that the evidence adduced was insufficient to permit the jury to find that the discrimination resulted from a good faith effort to meet competition within the meaning of the statute. Respondent's evidence on the subject was that the price to Flinco was set by reference to other major oil companies' price to their "wholesalers," which price was therefore a "standing offer" to Flinco (T. 1874-93). There was no evidence of an actual, as opposed to a "standing," offer to Flinco, and respondent's representatives admitted on cross-examination that they knew of no competitive offers which had been made to Flinco (T. 1504-5; T. 209-10; T. 1214-25). There was no evidence of "bargaining and haggling" between Texaco and Flinco, and no evidence that Flinco threatened to take its trade elsewhere. The price to Flinco was identical to the price which respondent charged to all of its wholesalers in the Utah area, the "distributor set up" (T. 175, 177, 209-10; T. 1873-1893). Finally it was shown that Flinco operated under three year exclusive contracts with respondent and that 8 of Flinco's stations were leased to it by respondent.

In its opinion, the Court of Appeals notes in passing that the ultimate conclusion of the seventeen year litigation of *F.T.C. v. Standard Oil,* 355 U.S. 396 (1957) was to uphold Standard's meeting competition defense in the case of jobbers "quite like Flinco" (Appendix A, p. xi).

Under a long line of authority in this Court, systematic price discrimination has been held insufficient to support a finding of meeting competition. *F.T.C. v. Staley,* 324 U.S. 746; *F.T.C. v. Cement Institute,* 333 U.S. 683; *F.T.C. v. National Lead,* 352 U.S. 419; *Corn Products Refining Co. v. F.T.C.,* 324 U.S. 726. The defense looks to a particularized situation in which there is real danger of the loss of a customer unless the anticompetitive discrimination is accorded him. No such situation was present here, and the Court strictly limited *F.T.C. v. Standard,* 355 U.S. 396 (1957) to its particular facts, and emphasized that the disposition of the case was based on *a finding* of bona fide bargaining. Another factor distinguishing *F.T.C. v. Standard,* 355 U.S. 396 (1957) is that the favored customers owned their own stations, 173 F.2d at p. 212, so that their loss meant also the loss of their stations. Here respondent leased 8 stations to Flinco, as to which the loss of Flinco meant only that respondent would need to find new operators for those stations.

Given no bargaining with the favored customer, and the fact that the discriminatory lower price was an integral part of respondent's and the industry's general pricing system, this Court should determine to what extent, if at all, respondent's contention that it has priced merely at the same level as has its competitors entitles respondent to the plenary protection of the 2b meeting competition defense.

H. THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE AMOUNT OF THE DISCRIMINATION MAY BE THE MEASURE OF DAMAGES IN A SECONDARY LINE ROBINSON-PATMAN ACTION, THE QUESTION IS IMPORTANT IN ANTITRUST ENFORCEMENT, AND INVOLVES PURELY AN ISSUE OF LAW, AND SHOULD BE DETERMINED BY THIS COURT.

In *Bruce's Juices v. American Can Co.*, 330 U.S. 743 at p. 757 (1947) this Court indicated that in a secondary line action under the Robinson-Patman Act the proper measure of damages is the amount of the discrimination. Although dictum, that observation was a prime support for the holding of the case, which was that Robinson-Patman may not be raised as a defense in an action in contract to recover the price of goods.

The Second Circuit in the case of *Enterprise Industries v. Texaco, Inc.*, 240 F.2d 457 (2d Cir. 1957) cert. denied 353 U.S. 965 held that the measure of damages is the value of trade diverted by reason of the discrimination, and that discrimination as the measure of damages is improper. In *Fowler v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), cert. denied 396 U.S. 1012 (1969), the Ninth Circuit expressly disapproved *Enterprise Industries* and affirmed a judgment in the amount of the discrimination.

It is perfectly clear that a business has suffered a direct and immediate injury in the amount of the discrimination when at the same time and for the same product which is resold, it is required to pay a substantially higher price than does another business with which it is actually engaged in competition for resale. *Fowler v. Gorlick*, supra. In this case the discrimination was clearly reflected in the resale price (T. 241; 320; 321; 424; 668; 735; 781; 962; Pls. Exs. 21, 21a, 22).

The large favored customer may use the discrimination to undersell the disfavored customer, or he may use it for any number of purposes in the conduct of his business which increase his competitive advantage. In such circumstances the amount of the unjustified anticompetitive discrimination is a proper measure of damages, unless damages consequent upon the diversion of trade are greater, which here they were not.

Respondent has pointed out that in early drafts of the bill, the amount of the discrimination as the measure of damages was explicitly set forth, and that in subsequent versions and prior to passage this provision was deleted. Manifestly however there is a clear difference between a Congressional desire to avoid straightjacketing the Courts and litigants with a single inflexible measure of damages applicable in all cases, and Congressional disapproval of that measure as one of several valid alternatives. While the matter is not clear, petitioners have found nothing in the Congressional history inconsistent with the former interpretation, and have found nothing except the inconclusive fact of deletion, which supports the latter interpretation.

This is an important issue in private litigation under the Robinson-Patman Act, the Circuits are clearly divided on the issue, and this Court should hear and determine the matter.

I. THE COURT OF APPEALS MISINTERPRETED THE FEDERAL RULES IN AWARDING RESPONDENT THE COST OF PRINTING THE TRIAL TRANSCRIPT.

Over petitioners timely objection, the Court of Appeals awarded respondent costs on appeal of $34,920.25. Of this amount $32,249.25 represented the costs of printing the appendix to respondent's brief below. The printed appendix included the entire trial transcript as well as numerous exhibits.

There was no stipulation between the parties that printing of the entire trial transcript (1837 pages) be deemed a taxable cost. In fact, petitioners three times in writing before submission of the case below stated to respondent their position that printing of the trial transcript was unnecessary.

Hence the only basis on which the Court of Appeals award can be sustained is that printing of the trial transcript was necessary to the appeal. Both the Federal Rules of Appellate Procedure and the Rules of this Court clearly indicate that *printing* of the trial transcript is unnecessary to an appeal and that the reporter's typewritten original and copies thereof are quite sufficient. Thus the rules provide that the fact that parts of the record are not printed in the Appendix does not prevent the Court from consulting those parts of the record and the rules further provide that the cost of printing unnecessary parts of the record shall be taxed to the party designating them (Federal Rules of Appellate Procedure 30; 32).

The purpose of the Federal Rules is to secure the just, speedy and *inexpensive* determination of civil actions (Federal Rules of Civil Procedure 1). Antitrust litigants

bear a substantial burden in purchasing typewritten transcripts, which perhaps correctly, have come to be regarded as necessary in antitrust cases and therefore properly taxable. However, to go a step further and include the *printing* of transcripts as a necessary cost, as the Court of Appeals has done here, is to close the doors of the Federal Courts to most victims of anticompetitive practices. This is inconsistent with both the Federal Rules and the Clayton Act (15 U.S.C. 15) by which Congress sought to alleviate the financial burden of private litigants. The holding here on costs provides the deep pocketed defendants of antitrust a ready deterrent to antitrust actions, and causes the private action to be a prerogative of the rich. Cf. *Farmer v. Arabian Oil Co.*, 379 U.S. 227 at p. 235 (1964). The cost of *printing* the trial transcript was not necessarily incurred on the appeal (28 U.S.C. 1924), perfectly legible copies of the reporter's transcript being already in the record in that Court, and the award was therefore error.

This Court should review an award of costs, such as that imposed here, which places a prohibitive price on justice in the Federal Courts.

CONCLUSION

This Court should grant the writ and re-affirm:

1) That an exchange of prices among dominant sellers which tends to restrain lower prices is illegal under the Sherman Act;

2) That routine price exchange among competitors is not necessitated by compliance with the Robinson-Patman Act;

3) That the Federal Courts have jurisdiction to hear and determine a complaint of price discrimination under the Robinson-Patman Act where defendant has abundantly used the instrumentality of interstate commerce in making such discrimination;

4) That price discrimination (referred to as a "functional discount") which does not truly reflect wholesaler services, which injures competition, and which is not cost justified, violates the Robinson-Patman Act.

5) That price discrimination which injures competition may be justified by the meeting competition defense only where the seller can show by a preponderance that he would have lost the favored customer and real economic value to a competitor but for the discrimination;

6) That an unjustified anticompetitive discrimination between competitors causes direct and immediate injury to the disfavored competitor in the amount thereof.

The writ should issue, the case should be heard on the merits, and the judgment of the District Court should be reinstated.

Dated, May 1, 1972.

Respectfully submitted,
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LAWRENCE ALIOTO,
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(Appendices Follow)

Appendix A

United States Court of Appeals
Tenth Circuit

January Term, 1972

Thomas E. Belliston, et al., Plaintiffs-Appellees, vs. Texaco, Inc., Defendant-Appellant	No. 71-1064

[February 4, 1972]

Appeal from the United States District Court
for the District of Utah, Central Division
(C-118-67)

Lawrence Alioto, San Francisco, California (Peter L. Spinetta, San Francisco, California, on the brief) for Appellees.

Milton Handler, New York, New York (Robert F. McGinnis, New York, New York and Milas C. Bradford, Jr., Denver, Colorado, on the brief) for Appellant.

Before SETH, HOLLOWAY and BARRETT, Circuit Judges.

BARRETT, Circuit Judge:

Plaintiffs-Appellees are 15 Texaco Service Station dealers in and around the Salt Lake City, Utah, area. They filed suit against Texaco, Inc. alleging anti-trust

violations. Trial was to a jury in Salt Lake City. Plaintiffs were awarded treble damages in the amount of $2,623,317. Plaintiffs-Appellees shall be referred to as Dealers. Defendant-appellant Texaco, Inc. shall be referred to as Texaco.

The amended complaint contained two counts, alleging four violations. Count one claimed that Texaco violated the Sherman Act, 15 U.S.C. § 1 in that it: (1) fixed the retail price at which Dealers must sell their gasoline; (2) coerced the Dealers to buy certain tires, batteries and accessories; and (3) conspired with other oil companies to fix the wholesale price of gasoline. The second count alleged that Texaco discriminated against the Dealers in the price of gasoline in violation of the Robinson-Patman Act, 15 U.S.C. § 13 (a). Texaco challenged the lower court's jurisdiction to hear the Robinson-Patman complaint in its answer and amended answer. During trial, Texaco again challenged the court's jurisdiction by its motion to dismiss.

Texaco and six other major oil companies were doing business in the Salt Lake City area together with many other independent companies during the period June 27, 1963 through June 27, 1967.

All of the Dealers operated retail service stations. They obtained their gasoline from Texaco. They were typical Texaco stations numbering about sixty in this particular area.

ROBINSON-PATMAN CLAIM

Dealers were awarded $597,011 in damages under 15 U.S.C. §§ 13 (a) and 15. They claimed that Texaco sold

gasoline to Flinco, a wholesaler, at a price less than that charged the Dealers. Essentially, Dealers had to buy their gasoline from Texaco at a contracted price. That price included trucking charges from American's bulk plant in Salt Lake City to each Dealer's station. Flinco supplied the same services for its stations. It picked up Texaco's gasoline in tank trucks at American's bulk plant and delivered it to various stations. Flinco received from Texaco ½ cent per gallon discount as payment for providing this delivery service above its approximately 4 cents per gallon bulk discount. Flinco owned a number of Texaco stations which it leased to others. At times it was necessary for Flinco to place its own salaried personnel in charge of stations to keep them open. Dealers charge that since Flinco paid less for its gasoline, it was able to sell gasoline from its own stations at a lower price, which it did, thereby injuring Dealers.

Dealers complained of being undersold by Flinco outlets. Although the pump prices for both types of stations were generally uniform, Flinco introduced a "bonus program" in which customers at its outlets were given merchandise and discounts. This program was, in effect, made possible by reason of the bulk discount granted Flinco by Texaco. Flinco sold gasoline to its dealers at 2¢ a gallon lower than Dealers could buy the same gasoline from Texaco. Flinco's Texaco brand stations then gave their customers certificates which could be redeemed for gasoline or other products. They also gave away glassware and chances on a car and a camper. Flinco dealers, in turn, paid for this promotion. It cost each of them about 3¢ per gallon to participate, or a net cost to

them of 1¢ per gallon. Dealers claim that this meant that Flinco's Texaco brand stations undersold them even though the retail prices on the pumps were the same for both types of stations.

Before Flinco started the "bonus program", it sponsored "canopy discounts" to customers at its stations. This involved a discount of several cents per gallon from the price showing on the pump. Flinco discontinued this practice when Texaco complained.

Dealers argue that against this background Flinco's 4¢ per gallon wholesale discount was completely unjustified. However, Flinco was required to provide services at its own expense to its outlets which Texaco provided free to its dealers. Flinco (1) provided all of the maintenance for its stations; (2) hired salesmen to take orders from its dealers for products offered; (3) supplied technical advice whenever needed; (4) provided money to pay for needed technical improvements, and (5) provided an accounting service to its dealers. Dealers claim that the ½ cent per gallon rebate was intended to cover all of Flinco's delivery expenses. Flinco was required to deliver gasoline all over the greater Salt Lake City area. This discount did not cover all of Flinco's delivery expenses. It is clear, however, that the total bulk discount to Flinco did create the opportunity for Flinco outlets to undersell Dealers. One of Texaco's employees testified that he was aware of the Flinco "bonus program" but that he was not aware that this meant that Flinco was underselling the Dealers. The first documented complaint received by Texaco from Dealers was a letter dated October, 1966, complaining of Flinco's "bonus program". Flinco's gen-

eral manager testified that Texaco some time thereafter terminated Flinco's contract (the date is not reflected in the record) because of alleged price cutting. Flinco then instituted a suit against Texaco.

Texaco claims lack of jurisdiction in that all of the alleged discriminatory sales took place in Utah. Texaco contends, and we agree, that the "in commerce" provision of the Robinson-Patman Act has not been satisfied.

Texaco purchased its gasoline on a buy-sell agreement with the American Oil Company. Texaco produced crude oil in Colorado and sold it to American. American then transported this crude oil intermixed with other crude oil via its pipeline to Utah where it was then refined at American's refinery. Texaco then purchased its gasoline, with Texaco's special ingredients, from American. Texaco then distributed the gasoline to its Dealers.

For the "in commerce" provisions of the Robinson-Patman Act to be satisfied, the sales must be in interstate commerce. Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231 (1951); Borden Company v. Federal Trade Commission, 339 F.2d 953 (7th Cir. 1964). *Borden* holds that it is not enough to show that a defendant is engaged in interstate commerce; rather, it must be established that the sale complained of was one occurring in interstate commerce. This court discussed the "in commerce" requirement of the Robinson-Patman Act in Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785 (10th Cir. 1967). Albertson's purchased its goods from two wholesalers in Salt Lake City. The wholesalers brought the goods into Utah and held title to them while in storage. Albertson's in turn supplied its retail stores in Salt Lake City. Al-

bertson's sold 49 nationally advertised items at a lesser price in one of its retail stores than it charged in its other retail stores. Plaintiff Food Basket was in competition with the store charging the lower prices. The trial court granted Albertson's motion for summary judgment, holding that the discriminatory sales were not in commerce. This court affirmed, and said:

> "It seems safe to assume that if the post-Meade Bread case law is contrary to the language used there, the Supreme Court would have corrected the misinterpretation on repeated applications for certiorari. *We take the statute to mean what it says, i.e., that at least one of the discriminatory sales complained of must be in commerce.*" (Emphasis ours). 383 F.2d at 787.

All of the discriminatory sales took place in the Salt Lake City area. Also see Becker v. Safelite Glass Corporation, 244 F.Supp. 625 (D.Kan. 1965) and Flotken's West, Inc. v. National Food Stores, Inc., 312 F.Supp. 136 (E.D.Mo. 1970). (The facts are similar to those in Food Basket, Inc. v. Albertson's, Inc., *supra*. However, here the *defendant* brought the goods into the state). In Hiram Walker, Incorporated v. A. & S. Tropical, Inc., 407 F.2d 4 (5th Cir. 1969), cert. denied 396 U.S. 901 (1969), the Court said:

> "Thus, the Robinson-Patman Act is applicable only where the allegedly discriminatory transactions took place in interstate commerce. That is, '. . . at least one of the two transactions which, when compared, generate a discrimination must cross a state line . . .'" (Citation omitted). 407 F.2d at 8-9.

In accord see the *Borden* and the *Standard Oil* cases, *supra;* Food Basket, Inc. v. Albertson's, Inc., *supra;* and

Walker Oil Company v. Hudson Oil Company of Missouri, 414 F.2d 588 (5th Cir. 1969), cert. denied 396 U.S. 1042 (1970).

In Abramson v. Colonial Oil Company, 390 F.2d 873 (5th Cir. 1968), cert. denied 393 U.S. 831 (1968), a service station owner sued its wholesaler-supplier charging price discrimination. It was held that since the supplier purchased the petroleum products within the state, the acts complained of did not occur in interstate commerce.

The lower court's determination that the gasoline was the same "stuff"—i.e., a petroleum product—that Texaco produced in Colorado, thereby creating an interstate connection, is not valid. Even if this distinction were valid the petroleum products "changed hands". Texaco did not import the crude oil into Utah. Some courts have said that even if the seller brings produce into the state, puts it in a warehouse and then sells to retail outlets there is no interstate commerce. Flotken's West, Inc. v. National Food Stores, Inc., *supra*.

In Lewis v. Shell Oil Co., 50 F.Supp. 547 (N.D.Ill. 1943) an oil company had contracted to supply filling station operators with gasoline in Illinois. The gasoline involved was shipped only from the oil company's bulk plant in Illinois to the stations. The Court held that a station operator could not bring an action against the oil company under the Patman Act for alleged price discrimination in favor of his competitors, since only "intrastate commerce" was involved. The oil company's activities in operating a bulk plant from which it supplied stations could not be construed as part of a continuous interstate haul. When gasoline shipped from Shell's Indiana facil-

ities to itself at the bulk plant in Illinois and not designed for any specific customer came to rest, any subsequent local transaction concerning it constituted no part of "interstate commerce" contemplated under the Patman Act. The Court noted that only those acts and transactions which are actually performed "in commerce" satisfy jurisdiction under the Patman Act and that nowhere does that Act confer jurisdiction in relation to transactions which simply "affect commerce". The Court held that the interstate movement ended when the gasoline came to rest in Shell's bulk plant.

There are two important decisions involving raw materials imported into a state, processed into a saleable product and there distributed. In Myers v. Shell Oil Co., 96 F.Supp. 670 (S.D.Cal. 1951), the Court held that the plaintiffs, retail service station dealers, could not prevail against Shell under the Patman Act because they failed to prove that the gasoline was involved in, or that the illegal acts complained of, affected interstate commerce. There was no competition between the complaining service station operators and service stations operated in states other than California. Since the plaintiffs did not compete in interstate commerce, the discriminating price activities of the defendant did not have an effect on interstate commerce. *The Court held that the Robinson-Patman Act did not apply to Shell with respect to gasoline it refined from crude oil which Shell itself had imported across state lines into California where the alleged discriminatory sales occurred.* The transactions between the plaintiffs and the defendant were found to be wholly intrastate in character.

In Baldwin Hills Building Material Co. v. Fibreboard Paper Products Corporation, 283 F.Supp. 202 (C.D.Calif. 1968), the Court held that the fact that gypsum, used for manufacturing wallboard, was shipped into California and sold to California buyers, did not provide the basis for a price discrimination claim under the Patman Act, which requires that the challenged discrimination occur in interstate commerce. Gypsum is substantially changed in character before it becomes a principal ingredient of wallboard. Accordingly, the Court reasoned that the articles sold to the plaintiff and its competitors had their origin in California. The fact that the raw materials were shipped into California did not provide a basis for a claim under Section 2 (a). The Court there noted that some of the shipments apparently included small quantities of wallboard of out-of-state origin. The Court applied the "de minimis" rule in holding that the Act applies only when the interstate aspects of the sales concerned are relatively significant. The defendant was granted a summary judgment on the ground that the alleged discriminations were not "in the course of . . . commerce . . .," within the meaning of Section 2 (a) of the Robinson-Patman Act, 15 U.S.C. §13 (a).

The lower court held that crude oil and gasoline are the same, i.e., petroleum products. This determination is a requisite for jurisdiction under the "flow of commerce theory" because only the crude oil crossed the Utah state line. The lower court erred in this conclusion. The production of gasoline from crude oil is a highly technical achievement. Refining has been defined as follows:

> ". . . a complicated succession of chemical and physical processes in which the quality of the finished

product depends to a large extent on the precision with which the operations are controlled. For this reason the refinery utilizes to the fullest extent the latest developments in the fields of fluid-flow, temperature, and pressure measurements. In modern refinery equipment the operating conditions are critical and the measuring devices are selected to combine accuracy and speed." J. Latta and H. Kauffman, *Petroleum Distillation and Testing,* p. 50, (1939).

One process in the refining of crude oil is cracking, which has been characterized as follows:

". . . . unbelievably complex, and is well understood only in principle. The numerous possible phases, the various possible or probable steps through which the hydrocarbons may pass to reach that of the final product desired, gasoline, and the undesired, but unavoidable by-products, fuel oil, carbon, and non-condensable gases, are known only as possibilities. It has not been determined just which of these steps are an integral part of the actual mechanism." A. Foster, *Petroleum Cracking and Refining,* pp. 1-2, (1939).

The first products of crude oil refining are recovered by distillation. Some of these are: (1) Methane, ethane, (2) Propane, (3) Butane, (4) Light naptha (component of gasoline), (5) Heavy naptha, (6) Kerosene, (7) Light and heavy gas oils, and (8) Residue (Source of asphalt or waxes). *Petroleum Processing Handbook,* Ch. 1, p. 6 (1967).

The production of gasoline from crude oil is a highly complex process requiring expensive, precision equipment and skilled technicians. We therefore conclude that when

crude oil is refined into gasoline, the character of these products is so changed that they cannot be equated as the "same stuff" to satisfy the requirements of the "flow of commerce" theory.

Dealers have cited several cases in support of their contention that the "in interstate commerce" requirement is met here. These decisions do not aid the Dealers: (1) Dealers cite Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231 (1951), *supra,* for the proposition that when gasoline is shipped across a state line and stored in anticipation of supplying nearly constant market demands, the gasoline remains in interstate commerce. Standard shipped the gasoline to itself across a state line. The product was never altered; therefore, the "flow of commerce" theory applied. This decision is not germane to the questions before us. We note, however, that the case also holds that Standard Oil Co. was permitted to give a 1½ cent per gallon discount to a jobber quite like Flinco in order to meet a competitor's bid. (2) Dealers also urge as support for the "flow of commerce" theory, Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785 (10th Cir. 1967), *supra.* This case does not lend any support to Dealers' argument. (3) Dealers cite Dean Milk Company v. Federal Trade Commission, 395 F.2d 696 (7th Cir. 1968), in support of the lower court's ruling that crude oil and gasoline are one and the same, i.e., petroleum products. There the Court held that raw milk which was produced out of state retained its essential identity and underwent only minimal changes during processing and it was ultimately sold as milk. The Court distinguished Central Ice Cream Company v. Golden Rod Ice Cream

Company, 287 F.2d 265 (7th Cir. 1961), cert. denied 368 U.S. 829 (1961), for the holding that when out-of-state butterfat and other ingredients are combined in Illinois, a new product is created and the "flow of commerce" theory is inapplicable. *Central Ice Cream* is applicable to the case at bar. Dealers also cite Foremost Dairies, Inc., v. Federal Trade Commission, 348 F.2d 674 (5th Cir. 1965), cert. denied 382 U.S. 959 (1965), which is quite similar to the *Dean Milk Company* case, *supra*. (4) Dealers also urge Hardrives Co. v. East Coast Asphalt Corp., 329 F.2d 868 (1964), cert. denied 379 U.S. 903 (1964), which involved purchasers of hot mix asphalt. The purchasers alleged a price fixing conspiracy. The Court held that the bitumen used to make the asphalt was in interstate commerce because the bitumen never changed in character. The bitumen was shipped hot in a "natural flowing state" and it was delivered and stored in the same condition. No process, other than heating, was ever performed on the bitumen until after the buyer took possession.

The "in commerce" requirement of the Robinson-Patman Act has not been met. The trial court did not have jurisdiction. The judgment recovered under this count is reversed and set aside.

SHERMAN ACT VIOLATION

The lower court directed a verdict in favor of the Dealers on the Sherman Act conspiracy count, and the jury awarded $274,733 in damages. Texaco and the other major oil companies in the Salt Lake City area exchanged information relating to gasoline prices. Dealers alleged

that this practice was in violation of the Sherman Act, 18 U.S.C. §§1, 2. On appeal, the Dealers concede that this claim must stand or fall on the applicability of United States v. Container Corporation of America, 393 U.S. 333 (1969).

In *Container*, the Court held that the reciprocal exchange of price information was a concerted action sufficient to establish the combination or conspiracy element of §1 of the Sherman Act. The Court found that the price exchanges tended to stabilize prices and thereby chill the vigor of price competition. The product was fungible and the demand inelastic. It was the practice of these manufacturers to inquire of each competitor, when the information was not available from other sources, the prices charged or quoted to individual customers on specific sales. These requests were usually honored with the expectation of reciprocity. It was understood that the price quoted represented the price currently being bid. This informal price exchange agreement tended to stabilize prices, although at a downward level, thereby invoking the penalties of §1 of the Sherman Act.

The facts are quite different in the instant case. The price charged for gasoline by Texaco to retail outlets was set by contract. The price information was used by Texaco to lower the price charged to its outlets during price wars in Salt Lake City so that its dealers could meet their competitors' prices. The prices exchanged represented the price being charged each distributor at the competitors' bulk plant, i.e., the Tank Wagon Price. The prices were publicly available. They were noted in

the trade journals and often announced in the Wall Street Journal. This distinguishes *Container* in that the prices involved there were not available through other sources. Texaco made its prices available to anyone regardless of any reciprocity.

This case and *Container* differ in other significant respects. In *Container*, the manufacturers-appellees supplied 90% of the demand for cardboard containers. They each competed for the same customers who were known to the manufacturers. The deciding factor which influenced these customers was, of course, price. The customers usually bought from two suppliers at a time and made purchases only for their immediate needs. Contracts were submitted for bids. Competitors had to meet current prices or submit a lower bid to obtain a contract. Thus, in *Container* all of the customers were identifiable to each manufacturer and the "price" quotations exchanged tended to stifle true competition. Here, however, Texaco used the price information in order to determine how much less it should charge its Dealers during the gasoline wars in Salt Lake City. While the original price had been set by contract, that price varied when it became necessary for Texaco to change it in order to meet competition for the benefit of its purchasers. Texaco's immediate customers were the same day in and day out. These customers had to buy from Texaco at a set price. In *Container* the Court determined that the manufacturers' actions had stabilized prices. In the instant case the record is replete with references to many gasoline wars of long duration involving drastic price cuts. This hardly indicates a "chilling" of the competitive atmosphere.

In *Container*, the manufacturers-appellees produced 90% of the containers in their market area. Here, 42% of the gasoline stations in the Salt Lake City area were independently operated. Not only does the record fail to disclose a price exchange agreement among all of the major supplying companies, but it also fails to evidence any exchange involving the suppliers of the independently operated service stations.

Texaco argues that the price exchanges enabled it to meet competition, which is a defense under the Robinson-Patman Act. This defense was discussed in Wall Products Co. v. National Gypsum Co., 326 F.Supp. 295 (N.D.Cal. 1971). That case also involved a price exchange agreement. The Court stated:

> "[P]laintiffs have continuously asserted that that decision (Container) is controlling here, and that consequently the verification communications of defendants, engaged in long before the decision in *Container*, violated Section 1 of the Sherman Act. Although this Court recognizes that particular pricing information of the nature involved in the verification communications of the defendants in these cases lends itself easily to concerted price fixing activities and to an unconscious direct retardation of the downward trend of prices, and, hence, a stabilizing effect on price, nevertheless, because the Supreme Court made no reference whatever in its opinion in *Container* as to the availability of the 'meeting competition defense' of Robinson-Patman, for reasons hereinafter indicated, this Court does not interpret *Container* as precluding a proven good faith Robinson-Patman defense." 326 F.Supp. 295 at 312.

See also Webster v. Sinclair Refining Company, No. 5673-69-T (Ala., Aug. 3, 1971). We hold that the *Container* decision does not control here.

The rationale of the *Wall Products* case is applicable here. The retail gasoline trade in Salt Lake City underwent many drastic price wars during the period in question. When a war started, it was necessary for the supplier of the retail outlets to grant allowances to their outlets so that they could lower their prices in order to remain competitive. When Texaco heard from one of its Dealers that a competitor had lowered its prices, Texaco endeavored to verify the information. Texaco neither asked for nor received information about impending price changes. By seeking verification Texaco was simply complying with the requirements laid down in Federal Trade Commission v. A. E. Staley Manufacturing Co., 324 U.S. 746 (1945). That is, Texaco was attempting to confirm the reports of its retail outlets that their competitors had lowered their prices. This much would be necessary before Texaco could lower its prices and still be within the "meeting competition" defense. See also Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231 (1951), *supra*. We hold that the judgment awarded under this count must be set aside.

VERTICAL PRICE FIXING

Dealers claimed and the jury found that Texaco attempted to set the Dealers' retail price of gasoline. The jury found that this was a violation of the Sherman Act but did not award any damages. Neither party appealed this verdict.

T.B.A.

Dealers claimed damages from Texaco's policy of requesting them to purchase only sponsored accessory items. Texaco received a 10% commission from the manufacturers of these items. The jury determined that Texaco violated the Sherman Act and that Dealers had suffered damages in the amount of $2,693.

Dealers contend that Federal Trade Commission v. Texaco, Inc., 393 U.S. 223 (1968) condemned this same type of T.B.A. arrangement (tires, batteries and accessories) and that Texaco violated the Sherman Act as a matter of law. We disagree.

In Atlantic Refining Co. v. Federal Trade Commission, 381 U.S. 357 (1965), the Court was faced with problems similar to those before us. Atlantic, like Texaco, had a commission arrangement with a tire manufacturer, Goodyear Tire and Rubber Company. Atlantic and Goodyear promoted the exclusive handling of Goodyear products by all of Atlantic's retail outlets. Atlantic employed coercive tactics to force its dealers into complying with the policy of selling only sponsored items. The Supreme Court held that this was not, per se, a tying arrangement. However, the court did treat the arrangement as a tying agreement because of the coercive tactics employed by Atlantic. Atlantic and Goodyear monitored the T.B.A. sales of each outlet and warned dealers if they sold unsponsored T.B.A. Some dealers were threatened with the loss of their leases if they did not comply. The record disclosed coercive acts, thus rendering it unnecessary for the Court to examine the economic impact

of the arrangement on the competitive market. The Court made it clear, however, that it did not hold that commission arrangements are per se illegal.

In the instant case we find no evidence of coercion on on the part of Texaco. In fact, Dealers' counsel stipulated that there was no coercion. He argued, and the jury was permitted to find, that that commission arrangement, coupled with Texaco's inherent economic power, was a per se violation of the Sherman Act. Dealers argued that this is the law by reason of Federal Trade Commission v. Texaco, Inc., *supra*. In that case, the Court was concerned with a violation of Section 5 of the Federal Trade Commission Act and not a treble damage action under the Sherman Act. The Court in Lee National Corporation v. Atlantic Richfield Company, 308 F.Supp. 1041 (E.D.Pa. 1970) distinguished the two when it said:

> "In considering . . . and like cases it must be remembered that they did not involve, as here, Federal Trade Commission proceedings under Section 5 of the Federal Trade Commission Act. In such Federal Trade Commission proceedings the function of the Court is somewhat limited in its review of administrative proceedings. Moreover, such proceedings contemplate, not an antitrust action or a treble damage action, as here, but rather the discovery of 'unfair methods of competition', by 'an administrative body of practical men' for the purpose of eradicating business 'evils' in an early or incipient stage. The Court's inquiry is concerned with the order of the Commission; whether it acted within the scope of the authority vested in it; whether there was 'warrant in the record' for its findings and conclusions; whether there is a 'reasonable basis in law' for its

order with particular reference, in some instances, to the reasonableness of the remedy reflected in the order. Language used by the Court in thus reviewing a Commission's order may not be taken out of context and used as the basis for a summary judgment in proceedings of a different nature such as a private treble damage action." 308 F.Supp. 1041 at 1047.

It was said in Atlantic Refining Co. v. Federal Trade Commission, *supra,* that:

"It has long been recognized that there are many unfair methods of competition that do not assume the proportions of antitrust violations." 381 U.S. at 369.

We conclude that, failing to find coercive conduct on the part of Texaco, the commission sales plan is not a per se violation of the Sherman Act. The Court's judgment awarding damages on the alleged T.B.A. claim is set aside.

We reverse and direct that the district court enter judgment for the defendant.

Appendix B

JANUARY TERM—MARCH 7, 1972

Before Honorable David T. Lewis, Chief Judge; and Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett and Honorable William E. Doyle, Circuit Judges.

Thomas E. Belliston; et al., Plaintiffs-Appellees, vs. Texaco, Inc., Defendant-Appellant.	No. 71-1064

This matter comes on for consideration of petition for rehearing and suggestion for rehearing en banc filed by appellees in the above case.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Seth, Holloway and Barrett to whom the cases were argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the petition for rehearing en banc is denied.

Howard K. Phillips, Clerk.

Appendix C

MARCH TERM—MARCH 28, 1972

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr. and Honorable James E. Barrett, Circuit Judges.

Thomas E. Belliston, Reed W. Ashcraft, William M. Barr, Blair N. Barton, Kim Buehner, Joe A. Daniels, Win Failner, Lawrence B. Forbush, Darrell E. Herzog, Clarence Hollingshead, Max Jardine, Bill Lewis, R. P. Lohbeck, Willard P. McEwan, Alfred C. Nielsen, Ray Shields, Marvin E. Thornton, Joy P. Mansfield and Glen Stowell, all individual Texaco Dealers, Plaintiffs-Appellees, vs. Texaco, Inc., a corporation, Defendant-Appellant.	No. 71-1064

This matter comes on for consideration of appellant's Bill of Costs and appellees' objection to the Bill of Costs, together with a response and supporting data on the part of both appellant and appellees.

Upon consideration whereof, it is

ORDERED that costs be allowed appellant as to the following items and to the extent of the following amounts:

1.	Appendix	$32,249.25
2.	Opening brief	1,836.00
3.	Reply brief	459.00
4.	Sales tax	351.00
5.	Docket fee	25.00
Total costs allowed appellant in this Court		$34,920.25

A true copy /s/ Howard K. Phillips,
(Seal) Howard K. Phillips, Clerk
Teste

Howard K. Phillips, Clerk,
U.S. Court of Appeals,
Tenth Circuit

By Anne Cabot,
Deputy Clerk.

Appendix D

SHERMAN ACT

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

CLAYTON ACT

SEC. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent com-

petition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And, provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been dis-

crimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

SEC. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 50(d)

MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this

rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

As amended Jan. 21, 1963, eff. July 1, 1963.

§ *1924. Verification of bill of costs*

Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 1.

SCOPE OF RULES

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.

1949 Amendment

Substituted "United States district courts" in lieu of "district courts of the United States."

1966 Amendment

Extended application of the Rules to include suits cognizable as cases "in admiralty".

FEDERAL RULES OF APPELLATE PROCEDURE

RULE 30(a)(b)

APPENDIX TO THE BRIEFS

(a) Duty of Appellant to Prepare and File; Content of Appendix; Time for Filing; Number of Copies. The appellant shall prepare and file an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings or opinion; (3) the judgment, order or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix with his brief. Ten copies of the appendix shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number.

(b) *Determination of Contents of Appendix; Cost of Producing.* The parties are encouraged to agree as to the contents of the appendix. In the absence of agreement, the appellant shall, not later than 10 days after the date on which the record is filed, serve on the appellee a designation of the parts of the record which he intends to in-

clude in the appendix and a statement of the issues which he intends to present for review. If the appellee deems it necessary to direct the particular attention of the court to parts of the record not designated by the appellant, he shall, within ten days after receipt of the designation, serve upon the appellant a designation of those parts. The appellant shall include in the appendix the parts thus designated. In designating parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation.

Unless the parties otherwise agree, the cost of producing the appendix shall initially be paid by the appellant, but if the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issues presented he may so advise the appellee and the appellee shall advance the cost of including such parts. The cost of producing the appendix shall be taxed as costs in the case, but if either party shall cause matters to be included in the appendix unnecessarily the court may impose the cost of producing such parts on the party.

RULE 32(a)

FORM OF BRIEFS, THE APPENDIX AND OTHER PAPERS

(a) Form of Briefs and the Appendix. Briefs and appendices may be produced by standard typographic printing or by any duplicating or copying process which produces a clear black image on white paper. Carbon copies

of briefs and appendices may not be submitted without permission of the court, except in behalf of parties allowed to proceed in forma pauperis. All printed matter must appear in at least 11 point type on opaque, unglazed paper. Briefs and appendices produced by the standard typographic process shall be bound in volumes having pages 6⅛ by 9¼ inches and type matter 4 1/6 by 7 1/6 inches. Those produced by any other process shall be bound in volumes having pages not exceeding 8½ by 11 inches and type matter not exceeding 6½ by 9½ inches, with double spacing between each line of text. In patent cases the pages of briefs and appendices may be of such size as is necessary to utilize copies of patent documents. Copies of the reporter's transcript and other papers reproduced in a manner authorized by this rule may be inserted in the appendix; such pages may be informally renumbered if necessary.